Supreme Court, U.S.
FILED

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No. _____
OFFICE OF THE CLERK

In the
Supreme Court of the United States

ELLEN L. BATZEL, a citizen of the State of California,

Petitioner,

v.

ROBERT SMITH, a citizen of the State of North Carolina; TON CREMERS, a citizen or subject of the Netherlands; MOSLER, INC., a Delaware corporation with its principal place of business in Ohio,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit permitted a defendant web site operator to appeal a district court's order denying his special motion to strike pursuant to California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. The Ninth Circuit questioned whether the plaintiff had proven a probability of success on the merits of her defamation case, because of the web site operator's purported immunity from liability under the Communications Decency Act, 47 U.S.C. § 230. The court held that the web site operator was not "responsible, in whole or in part, for the . . . development" of certain defamatory content that he posted on his web site and disseminated to 1,000 electronic newsletter recipients, within the meaning of the definition of "information content provider" set forth in § 230(f)(3). The Ninth Circuit further ruled that whether defamatory content authored by a third person was "provided by another information content provider" under § 230(c)(1) turned on whether the web site operator reasonably concluded that the material was intended for publication on the Internet – regardless of the third person's actual intent not to publish the material – and remanded the case to the district court to develop the facts under the new standard. Finally, the court did not consider whether the web site operator was subject to liability as a knowing "distributor" of defamatory statements on the Internet, rather than as a "publisher or speaker" entitled to immunity under § 230(c)(1).

Four questions are presented:

(1) When an interactive computer service provider or user, in an effort to create content for both his web site and his electronic newsletter, plucks a private e-mail from his inbox that contains obviously defamatory statements about another, makes changes to the message, adds captions,

posts it on his web site, and forwards it to over 1,000 electronic newsletter recipients, thereby knowingly disseminating defamatory statements, is such service provider "responsible . . . in part for the . . . development" of the content under 47 U.S.C. § 230(f)(3), thereby negating statutory immunity?

(2) When an interactive computer service provider or user receives an e-mail from a stranger that contains obviously defamatory statements about another, in an e-mail account not designated as one to receive online content for publication, and it is not clear on the face of the e-mail that the author intended for the message to be published on the Internet, is the content treated as "information provided by another information content provider" for purposes of immunity under 47 U.S.C § 230(c)(1), or does the service provider have a duty to determine the author's intent before posting the message online and disseminating it to over 1,000 electronic newsletter recipients?

(3) When an interactive computer service provider or user receives an e-mail from a stranger that contains obviously defamatory statements about another, yet posts the e-mail on his web site and disseminates it to over 1,000 electronic newsletter recipients, can the service provider be treated as a "knowing distributor" of the defamatory statements, rather than a "publisher or speaker" entitled to immunity within the meaning of 47 U.S.C § 230(c)(1), and therefore be held liable under the common law knowledge-based liability standard applicable to "distributors" of defamatory content?

(4) Is an order which interprets and applies 47 U.S.C § 230 and denies a special motion to strike pursuant to a state

anti-SLAPP provision, a final order for purposes of the Collateral Order Doctrine, when the effect of the order is the same as other interlocutory orders that may not be immediately appealed, and the party seeking an interlocutory appeal is a private party engaged in exclusively private activity, such that requiring the party to stand trial will not negatively affect the efficient administration of government or deter able people from public service?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were Petitioner Ellen L. Batzel, Respondents Ton Cremers and Mosler, Inc., and Amicus Curiae Public Citizen. The district court's judgment in favor of Mosler, Inc., a Delaware corporation, was affirmed by the Ninth Circuit, has become final, and is not the subject of further proceedings in this or any other court. So far as is known to Petitioner, Mosler Indiana, LLC, an Indiana limited liability company, and Mosler of Alabama, Inc., an Alabama corporation, are the only entities potentially owning 10% or more of Mosler, Inc.'s stock, which may need to be disclosed pursuant to Sup. Ct. R. 29.6. Following the sale of substantially all of their assets, Mosler, Inc. changed its name to MDIP, Inc.; Mosler of Alabama, Inc. changed its name to MDIP of Alabama, Inc.; and Mosler Indiana, LLC changed its name to MDIP Indiana, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Ellen L. Batzel, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Ninth Circuit entered in this case on June 24, 2003, and the denial of re-hearing entered in this case on December 3, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 333 F.3d 1018. The order denying the petition for re-hearing is reported at 351 F.3d 904. The opinions of the district court are reported at 2001 U.S. Dist. LEXIS 8929 and 2001 U.S. Dist. LEXIS 11921.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was issued on June 24, 2003, and the petition for rehearing was denied on December 3, 2003. This court has jurisdiction over this petition under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13(3).

RELEVANT PROVISIONS INVOLVED

47 U.S.C. § 230 in pertinent part:

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy,

excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

(e) Effect on other laws:

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(f) Definitions. As used in this section:

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

Cal. Code Civ. Proc. § 425.16 in pertinent part:

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case tests the scope of immunity of interactive computer service providers and users from liability for the publication and republication on the Internet of defamatory statements, under the Communications Decency Act, 47 U.S.C §230.

Ton Cremers ("Cremers") received an e-mail from a stranger that contained false and defamatory statements about the Petitioner, Ellen Batzel ("Petitioner" or "Batzel"). This message alleged that Batzel had bragged about being related to the Nazi war criminal Heinrich Himmler, and that she had inherited hundreds of pieces of art looted by the Nazis from the Jewish people that she openly displayed in her home in North Carolina. Without any prior investigation, Cremers posted these defamatory statements on his prestigious Museum Security Network web site and included them in his newsletter transmitted to 1,000 subscribers. Subsequent investigation revealed that the source of the statements could not verify their truth, and in fact the source admitted that the statements were not true. Cremers has not retracted, and continues to refuse to retract, the false and defamatory statements. Cremers's actions have harmed Petitioner's professional and social reputation. Rather than accept responsibility for the harm he has caused, Cremers claims

absolute immunity from liability under § 230 of the Communications Decency Act.

Section 230 of the Communications Decency Act does not shield Cremers from liability when he developed the content by actively selecting defamatory material for distribution on the Internet, knowing full well its defamatory and offensive nature.

II. STATEMENT OF FACTS

Cremers is the operator of a subscription-based Museum Security Network ("Network"), which maintains a web site and electronic newsletter about museum security and art theft. App. 71a.

Cremers's website and newsletter contain, for the most part, e-mails, news articles, and his own commentary. App. 18a. The Network web site does not have any interactive feature by which a visitor to the site may post messages for other visitors to read. (R. 1248). Everything published on the web site and in the newsletter is selected, provided, developed or created by Cremers, and subject to Cremers's editing and censorship. (R. 1252-54). In September, 1999, the Network's subscribers included prestigious art museums, universities, galleries, government institutions and cultural organizations, and private citizens. Cremers has won awards from U.S. organizations for his website and newsletter, and Cremers lectures publicly on stolen art and museum security. (R. 1249).

On September 10, 1999, Cremers received an e-mail from a stranger, Bob Smith ("Smith"). The e-mail stated that he worked for Ellen L. Batzel ("Batzel"), and that she had bragged to him about being the grand daughter of "one of Adolph [sic] Hitler's right hand men," Heinrich Himmler. App. 65a. The e-mail also stated that Batzel had "hundreds of older European paintings on her walls, all with heavy carved wooden frames," and that "she told [Smith] she

inherited them." Smith further indicated that these paintings were Nazi-looted art. He listed Batzel's entire home address, and finished by saying that he did not "know who to contact about this, so I start with your organization. Please contact me via e-mail at dodona@earthlink.net or phone (828) 628-2389 if you would like to discuss this matter further." App. 65a.

Except for Smith's contact information and Batzel's address, the statements in Smith's e-mail are false. Smith has admitted that Batzel did not brag to him about her ancestry, or tell him that she inherited all her paintings. App. 68a. He has also admitted that he did not see any of Batzel's paintings hanging on her walls, because they were wrapped in bubble wrap in Batzel's garage when he saw them. Id. In fact, Batzel did not inherit any art; she purchased most of her paintings; at the time of Smith's statements Batzel owned only ten pre-1945 paintings; and only one had a heavy carved wooden frame. App. 67a. Further, neither of Batzel's parents possessed any art painted prior to 1950. App. 68a.

Batzel was an attorney with a law practice in both North Carolina and Los Angeles. She was active in the art world and with her alma mater, the University of Pennsylvania. (R. 531, 1002). Records on file at the World Jewish Congress would have shown that "Batzel" was not a name on the list of "Nazi-Art Looters." (R. 850-51). An investigation into the public record would have shown a bitter dispute between Smith, who painted Batzel's house in North Carolina, and Batzel. (See, e.g., R. 79-83, 278, 291-292).

Upon receiving Smith's e-mail, Cremers did not contact either Smith or Batzel. (R. 1013). Rather, Cremers decided to post Smith's message in his newsletter. (R. 259-0, 310, 312). He forwarded the e-mail from his e-mail account used by Smith to his newsletter e-mail account at securma@xs4all.n1 (R. 310, 312), formatted it in the proper newsletter format, and added the defamatory headline,

"Stolen Art." He also arguably changed some of the content in the message. (See R. 42-51). Cremers then sent out the newsletter to readers worldwide, (R. 933), opining, "Let the subscribers react." (R. 310). He also posted the entire newsletter on the network web site under the url http://www.museum-security.org/artcrime.html. (emphasis added). Smith's message was now available not only to Cremers's 1,000 subscribers, but for the whole world to see.

The Network then forwarded Smith's message to several prominent cultural institutions. (See R. 829, R. 855, R. 845). None of these parties could corroborate Smith's statements about Batzel.

After posting Smith's false statements on the Network web site and including them in the newsletter, the Network contacted Smith to investigate his statements. (R. 286). Smith stated that he was a writer, that Batzel was a lawyer, (R. 286, 294), and that he had "little knowledge" about art, just "suspicions of a crime" by Batzel. (R. 286).

Smith also expressed concern over Cremers' publishing of his private e-mail. Smith noted that he hadn't posted his e-mail to a Network bulletin board, and further that he didn't "remember reading anything about a message board, either," so he was "a bit confused over how it could happen." (R. 294). In fact, the e-mail address to which Smith sent his message is not the e-mail address ordinarily used by the Network to receive Internet postings or content offered to Cremers to be considered for publication. App. 20a. The actual address the Network used to receive messages for posting on the web site and newsletter was securma@xs4all.nl; Smith's e-mail, however, went to securma@museum-security.org. App. 17a. The Network replied that Smith's message had been forwarded because it was "thought provoking." (R. 297).

Soon thereafter, Cremers published his own commentary in the newsletter and on the web site. Although he expressed

his regret for forwarding Smith's private e-mail, he did not reveal that he had corresponded with Smith and others, none of whom could corroborate Smith's statements. (R. 836, 841).

Batzel finally discovered the defamatory messages in January, 2000 when she received an anonymous "snail mail" letter, which included a print-out of Smith's statements as published by Cremers. (R. 742, 927-29). This came after Batzel inexplicably lost a prominent entertainment client (from a Jewish family) with connections both to the art world and to the University of Pennsylvania. Batzel contacted the Asheville District Attorney's Office, which advised her to get a bodyguard, sell her home, and move. (R. 345).

Batzel contacted the Network. (R. 743, 931, 974). She advised the Network that Smith's statements were not true, that she had purchased all of the art in her possession, that she had no Nazi ancestors, and that her life and property were at risk. (R. 345, 931, 958, 1348, 756, 998). Cremers admitted to Batzel that he had forwarded Smith's statements to his newsletter, that he had posted the statements on his web site, and implied that he already knew that Smith's statements were false. (R. 933). He then advised Batzel to keep quiet about this "tragic mistake." (R. 933). Batzel demanded that Cremers redress the harm that he had caused her, but Cremers refused to take responsibility for the damage he had caused.

On January 1, 2000, the Network advised Batzel that an apology and correction had been printed months earlier (R. 992, 936-37), even though no correction or retraction by the Network had been made in the newsletter, on the web site, or to the third parties to whom the Network had separately sent Smith's unverified, false statements. (R. 941-42).

Cremers finally removed the September 10, 1999 newsletter that contained Smith's statements from the website after Batzel contacted one of the Network's sponsors, Mosler,

Inc. He still did not, however, reveal that his private investigation of Batzel, which included correspondence with Batzel, Smith, and third parties, failed to verify Smith's statements. (See R. 941-42, 1440-41).

Cremers continued to pursue his investigation of Batzel, re-establishing contact with Smith (R. 299), speaking to Asheville attorney Linda Pinkerton, a Network subscriber, (R. 1033-34), and investigating Batzel's medical history. (R. 1027, 1015).

Meanwhile, in 2000, Batzel's business and social reputation suffered as a result of Cremers's actions. In March and April 2000, a complaint was filed with the North Carolina Bar, and letters were circulated in Asheville, repeating Smith's false statements as true. (R. 333-34). Batzel sold her North Carolina home, closed her North Carolina law practice, and left the state. (R. 756, 1045). On September 7, 2000, Batzel filed suit against Cremers and Smith. (R. 1-14). As of March 1, 2004, Cremers and the Network have not published a retraction of Smith's false statements.

III. PROCEEDINGS AT THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Ellen Batzel filed a diversity action based on 28 U.S.C. §1332(a)(3) against Cremers and others in the Federal District Court for the Central District of California on September 7, 2000. On March 26, 2001, Cremers moved to dismiss for lack of personal jurisdiction and forum non conveniens, and specially moved to strike pursuant to Cal. Civ. Proc. Code § 425.16 ("anti-SLAPP motion"), alleging that Petitioner could not prove probability of success on the merits, in part because of his purported immunity under 47 U.S.C. § 230. On June 5, 2001, the district court denied the motion to dismiss for lack of personal jurisdiction and forum non-conveniens. It also ruled that Cremers was not immune under

§ 230, that Petitioner was a private figure, and that the statements involved a matter of public concern. The district court requested additional briefing on the issue of whether Petitioner had established a prima facie case of defamation and falsity. Following further briefing, on July 25, 2001, the district court denied Cremers's anti-SLAPP motion, holding that Batzel had made a prima facie showing of the probability of her success on the merits.

IV. PROCEEDINGS AT THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cremers appealed the district court's interlocutory order on July 27, 2001. The Court of Appeals for the Ninth Circuit refused to hear Cremers's appeal of the district court's order denying the motion to dismiss for lack of personal jurisdiction. The court then vacated the district court's order denying the anti-SLAPP motion, and remanded the case to the district court for further analysis of Cremers's immunity under 47 U.S.C. § 230.

Batzel timely petitioned for rehearing and rehearing *en banc* from the Ninth Circuit's order on July 14, 2003. The Ninth Circuit panel denied Batzel's petition on December 3, 2003.

REASONS FOR ALLOWANCE OF WRIT

I. THE SCOPE OF IMMUNITY UNDER 47 U.S.C. § 230 IS AN IMPORTANT QUESTION OF FEDERAL LAW ON WHICH THE COURT HAS NEVER RULED, BUT SHOULD.

One circumstance in which the Court may grant certiorari is when a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by the Court. Sup. Ct. R. 10(c) (2003). This case presents very important questions of federal law—the scope of immunity from state law defamation actions for service providers and users under 47 U.S.C. § 230 and

the definition of its terms—which has been decided by a United States court of appeals. The Supreme Court should settle this issue because of the importance of the law and commerce affected, and because there is great conflict among courts and legal scholars as to interpretation of the statute's provisions.

a. Immunity Under § 230 is an Important Question of Federal Law.

When Congress passed § 230 of the Communications Decency Act (CDA), it recognized that the Internet was a rapidly growing and increasingly important method of communication. It noted that the Internet and other interactive computer services represented an extraordinary advance in the availability of educational and informational resources, and that Americans were increasingly "relying on interactive media for a variety of political, educational, cultural and entertainment services." 47 U.S.C. § 230(a)(1), (5). Congress recognized the need to legislate Internet defamation issues in 1995, at a time when about 9% of American adults were Internet users. Humphrey Taylor, The Harris Poll #8: Those with Internet Access to Continue to Grow but at a Slower Rate, February 5, 2003, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=356. Today, 67% of American adults (140 million people) are Internet users. Id. The Internet has truly become an integral and indispensable part of American life.

United States federal and state courts have dealt with Internet defamation issues in over 160 cases since 1996. Search of LexisNexis, Federal and State cases, combined (Search for records with date after Jan. 1, 1996 and with "Internet" in the same sentence as "defamation.") This of course does not include issues that have not reached litigation.

Liability for defamation over the Internet is a litigious issue, one that is still forming.

Issues of liability are important to service providers and users. At a time when trial awards of defamation damages average $3.4 million, Press Release, Annual Study of Media Law Trials, etc., Libel Defense Resource Center, Inc., 2004, available at http://www.ldrc.com/ Press_Releases/ bull2004-1.html, understanding liability and immunity informs a service provider or user's actions. They need a clear understanding of the law to assure the "continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1).

This understanding and informed action is also important to the general public. With increased Internet use comes increased opportunities for abuse—there is the potential for more people to view more defamatory material online. Thus, there are more people who can be injured by Internet defamation; and those injured will suffer greater harm. This makes the scope of immunity under § 230 a very important question of federal law.

b. The Supreme Court Should Settle the Question of the Scope of § 230 and the Definition of its Terms.

It is not unusual for the Court to grant certiorari based on the importance of the question presented. See, e.g., Lowe v. SEC, 472 U.S. 181, 188-89 (U.S. 1985) (granting certiorari to resolve the important question of whether an injunction against a publisher of a semi-monthly investment newsletter violated the First Amendment); DeSylva v. Ballentine, 351 U.S. 570 (U.S. 1956) (granting certiorari to resolve an as yet undecided question under the Copyright Act, which had "great importance...in the administration of the [ ] Act," id.

at 572). There is no doubt that this case presents an important question that is vital to the administration of the Communications Decency Act. There is also, however, an added, compelling incentive—conflict among federal and state courts, as well as legal scholars, warrants a final resolution by the Court.

The first area of conflict is the determination of when information has been provided by another information content provider. Under § 230, if a service provider or user has developed or created material, then that service provider or user is the information content provider, 47 U.S.C. § 230(f)(3), and thus is not immune, id. at § 230(c).

Congress intended for § 230 to encourage self-policing among service providers and users. 141 Cong. Rec. H8469, H8470 (daily ed. Aug. 4, 1995). The limited holdings in Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) and Ben Ezra v. Am. Online, 206 F.3d 980 (10th Cir. 2000) -- that reserving the right to screen or remove materials from a web site does not transform a service provider or user into a content provider -- does not disturb this intent. However, in this case, the Ninth Circuit has narrowed the definition of "develop" so far that it now conflicts with Congressional intent.

A second area of contention is the scope of immunity under § 230. In Zeran v. Am. Online, 129 F.3d 327 (11th Cir. 1997), the Eleventh Circuit held that § 230 abrogated the common law doctrine of knowledge-based, distributor liability for all service providers and users that post information provided by a third party. In Barrett v. Rosenthal, 114 Cal. App. 4th 1379 (Cal. App. 1st Dist., 2004), the First Appellate Division of California held that § 230 precludes immunity for a service provider or user if they know or have reason to know of the defamatory nature of the information provided by another information content provider. This is a direct conflict

between federal and state courts. Further, many legal scholars take the view of the Barrett court that the Zeran court's analysis is flawed.[1] Barrett, 114 Cal. App. 4th at 1395.

There are conflicts between federal and state court decisions. Legal scholars strongly disagree with the circuit courts' interpretation of § 230. The federal court decisions misinterpret Congressional intent, and application of these courts' standards frustrates Congress's policies. Thus, this is an important question of federal law on which the Court should rule.

i. The Ninth Circuit incorrectly narrowed the definition of "develop" under 47 U.S.C. § 230.

According to 47 U.S.C. § 230(c), a service provider or user can only be immune from liability if the published defamatory statements were provided by another information content provider. An information content provider is defined as a person "responsible, in whole or in part, for the creation or development of information..." 47 U.S.C. § 230(f)(3). Thus a service provider or user is not immune if they create or develop the content.

By actively selecting Smith's defamatory message for posting on his web site and in his electronic newsletter, Cremers added his imprimatur to, and developed, the

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[1] See, e.g., Brian McManus, Rethinking Defamation Liability for Internet Service Providers, 35 Suffolk U. L. Rev. 647 (2001); Steven Cordero, Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law, 9 Fordham Intell. Prop. Media & Ent. L. J. 775 (1999); Ian C. Ballon, Zeran v. AOL: Why the Fourth Circuit is Wrong, J. Internet L. (1998); David Sheridan, Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation and the Internet, 61 Alb. L. Rev. 147 (1997).

message, therefore he is not entitled to immunity under § 230. This interpretation of "develop," corresponds with the policies that motivated Congress's enactment of § 230.

In deciding Batzel v. Cremers, the Ninth Circuit asked whether Cremers could be considered to have develop[ed] Smith's e-mail message. App. 38a-39a. The court concluded that Cremers did not develop Smith's message because his selection of Smith's message and his alterations prior to its posting did not "rise to the level of 'development.'" App. 39a. The court relied on Zeran, Ben Ezra, Blumenthal, and Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. Ct. App. 2001) to hold that deciding whether to publish, withdraw, postpone or alter content does not transform a service provider or user into a content provider. App. 39a n. 18, citing Zeran, 129 F. 3d at 330.

The Ninth Circuit's analogy to these cases is faulty, because it incorrectly narrows the definition of "develop," thereby granting immunity to information content providers, and expanding immunity beyond that contemplated by Congress. This expanded immunity is unnecessary, because a broad definition of "develop" will not subject service providers and users who simply "screen out" or remove questionable material to potential liability.

In his dissent to the majority opinion denial of re-hearing in Batzel v. Cremers, Judge Gould sets forth an alternative standard for development. When a person selects material from a private communication for broad dissemination to over 1,000 network subscribers and on the Internet, that person has developed the material, and therefore it cannot be said to be provided by another information content provider. See App. 54a-55a, 4a.

"Develop" is defined as "a change in the course of action or events or in conditions; a state of advancement; an

addition; an elaboration." App. 4a, citing The New Oxford English Dictionary 654 (Thumb Index ed. 1993). When a party selects material for publication on the Internet, that person has transformed the information, bolstering its message with his affirmative decision that it is worthy of dissemination; the "decision to select particular information for distribution on the Internet changes the information in a subtle but important way: it adds the person's imprimatur to it." App. 54a. Thus, that person has added to, advanced, and changed the perception of the defamatory message; he has "developed" the information.

Such an interpretation of "develop" corresponds to Congressional intent. First, it maintains immunity for service providers and users that simply "screen out" materials before posting, or remove materials after posting. App. 10a-11a.

This standard can be distinguished from those in earlier cases. For example, in Ben Ezra the court held that American Online (AOL) was not an information content provider because AOL simply reported errors to the author, or removed information in an effort to correct the errors. Ben Ezra, 206 F.3d at 985-86. Thus, AOL was simply screening and removing material after it was posted. Similarly, in Blumenthal, the court found that AOL's actions did rise to the level of development because AOL contracted with a content provider, and under this contract, the content provider was the sole author. AOL merely reserved the right to remove or edit questionable material that had been selected by the author. Id. Again, AOL was simply screening and removing material.

In this case, Cremers actually selected the material that would be placed on his web site and in his e-mail newsletter based on the substance of the individual message. He received e-mail submissions from his subscribers and others, reviewed the materials, and selected those that he considered

relevant and appropriate. App. 18a. His actions go far beyond those of AOL in Ben Ezra and Blumenthal.

Because service providers will not be liable for simply screening out or removing material, they will not be discouraged from self-policing. If they are actually selecting material for posting, they will be cautious to post only appropriate material. More questionable material will be prevented from being posted on the Internet, or will be removed from the Internet, than would be under the Ninth Circuit's rule.

Second, § 230 was not intended to grant immunity to service providers and users, like Cremers, who can be said to "develop" their content through absolute control over their web sites by virtue of their smaller size. In first introducing the amendment that would become § 230, Representative Cox focused on large, Internet access providers. "We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer... ." 141 Cong. Rec. H8469, H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (emphasis added). Later, in his own remarks in support of § 230, Representative Goodlatte commented that entities like Prodigy could not take responsibility to edit out information coming from "all manner of sources" onto their bulletin board, because they are "far larger than our daily newspaper...something that is going to be thousands of pages of information every day." Id. at H8471 (statement of Rep. Goodlatte).

Even the cases cited by the Ninth Circuit majority, Zeran, Ben Ezra, and Blumenthal, all involve America Online (AOL), a large, Internet access provider.[2] To such a large

[2] In Schneider, the Defendant was Amazon.com, a large commercial web site. In 2003, it set "a single-day record with more than 2.1 million units ordered," and on one day, topped an

corporation, and others like it, that provide Internet service to roughly 35 million people, AOL Value: Membership/Community, at http://compare.aol.com/member.html (last visited Feb. 4, 2004), and for whom a notable portion of their content is created by and posted automatically by members, see id., there will be "thousands of pages of information every day."

What is missing from the Congressional record and the above courts' analyses is any reference to smaller web sites, like the Museum Security Network, that do not have as many members or visitors,[3] and for whom much of the content is created by the Webmaster or received from other parties and posted at the Webmaster's discretion. App. 18a. Clearly, in enacting § 230 Congress was concerned about extending liability to large service providers, and not smaller web sites that maintain absolute control over content.

ii. The Ninth Circuit's rule for when material has been "provided by another information content provider" contravenes Congressional intent.

The Ninth Circuit did question whether Smith's e-mail was actually "provided" to Cremers for purposes of § 230; not because Cremers created or developed it, but because Smith stated repeatedly that he did not intend for Cremers to

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hourly record of 630,000 visitors. Press Release, Amazon.com Wraps Up Its Ninth Holiday with Busiest Season Ever, Dec. 26, 2003, available at http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=IROL-NewsText&t=Regular&id=480390.

[3] According to the web site, the Museum Security Network has approximately 1,400 subscribers, Mission Statement, at http://www.museum-security.org/indexdefinitief.html? (last visited Feb. 4, 2004), and the website is visited an average of 1,100 times per day, see Website Statistics at http://www.museum-security.org/logs/ (last visited Feb. 4, 2004).

post it on the web site. App. 44a-45a. If an author does not intend for material transmitted to a service provider or user to be posted on the Internet, then the material has not been "provided by another information provider." App. 42a-43a.

The court first concluded that without an incentive for service providers and users to evaluate whether an author intended material to be posted, speech over the Internet would be chilled, in part because "[u]sers of the Internet are likely to be discouraged from sending e-mails for fear that their e-mails may be published on the web without their permission." App. 44a-45a. Encouraging service providers and users to determine whether material was intended for publication will decrease defamatory material on the Internet, because a person is more likely to exercise greater care in choosing his words if they are to be widely read. App. 45a.

The court's analysis, however, then makes a U-turn, concluding that focus should not be on the author's intent, but the "service provider's or user's reasonable perception of those intentions or knowledge." App. 46a. The court then held that a service provider or user is immune under § 230 if the materials were provided to them by a third party "under circumstances in which a reasonable person in the position of the service provider would conclude that the information was provided for publication on the Internet... ." Id.

This rule is fundamentally flawed because it directly contradicts Congress's intent to promote self-policing among service providers and users. Rather than encouraging service providers and users to remove questionable material, the Ninth Circuit decision grants carte blanche to post any material sent to the service provider or user, as long as the author wanted the content on the Internet. As Judge Gould artfully stated in his dissent, "So long as the defamatory information was written by...a person with an axe to grind,

the rumormonger's injurious conduct is beyond legal redress." App. 53a (internal parenthesis removed).

The court's rule contradicts its own conclusions. The court first acknowledges that the author's intent is a vital key to granting or precluding immunity, App. 44a-45a, but then gives only two options—granting blanket immunity, or granting immunity if the service provider reasonably believes the author intended publication on the Internet. The court's choice, focusing on the reasonable belief of the service provider or user, does nothing to allay an author's fear that materials will be posted without his consent, and does not address a scenario where the service provider or user is unsure of the author's intent.

There is, however, a third option: require service providers and users to inquire of authors whether they intended publication on the Internet, if such intention is not clear on the face of the content provided. This rule is practical and fair. First, the intention of the author can be made clear by setting up a submission process by which it is obvious to the author that the material will be posted on the Internet. One option is an automatic posting or an e-mail account specified for online posting; another option is a system similar to "click-through" licensing wherein the author must click "yes," to indicate that he wishes the information to be posted online.

The provider or user could similarly set up processes for materials specifically not intended to be posted on the Internet. Again, the author's intent will be clear from the face of the information. The remaining information will be received by various methods, and the author's intent may be unclear. But the number of messages received in this way will be limited, and the service provider or user may make the choice either not to post the material on the Internet, or to contact the author.

iii. The Ninth Circuit erred in classifying Cremers as a publisher or speaker under § 230 for the purpose of immunity; Cremers is more properly classified as a knowing distributor.

The Ninth Circuit also erred in classifying Cremers as a publisher or speaker. Cremers knew of the defamatory nature of Smith's statements, therefore he should be held to the knowledge-based liability standard. This standard precludes immunity for a service provider or user if he knows or has reason to know of the defamatory nature of the information provided by another content provider. Barrett, 114 Cal. App. 4th at 1392.

In general, under the common law, one who conveys a third party's libel can be treated in one of three ways: (1) as the primary publisher of the libel, (2) as a conduit, or (3) through the delivery or transmission of the published libel. See Barrett 114 Cal. App 4th at 1390 (discussing the sources of defamation liability). In the first instance, primary publishers are often held to a strict liability standard. Restatement (Second) of Torts, § 580B. Conversely, conduits are ordinarily immune from liability. See Restatement (Second) of Torts §§ 581 cmt. b, 612 cmts. f-g. One who delivers or transmits defamatory materials published by a third party is liable if they know or have reason to know that the material was defamatory. Restatement (Second) of Torts § 581.

With the introduction of the Internet, prior to Congress's enactment of § 230, courts struggled with how to apply these common law classifications to Internet service providers. In Cubby, Inc. v. CompuServe, 776 F. Supp. 135 (S.D.N.Y. 1991), the court classified CompuServe as a distributor, and therefore held it to the knowledge-based liability standard. In Stratton-Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct. May 24,

1995), however, the court classified Prodigy as a publisher, and held it strictly liable.

At least two cases decided after Congress's enactment of § 230 have grappled with the extent of immunity under § 230, and reached opposite results. In Zeran, 129 F. 3d 327, the Fourth Circuit held that "distributors" were simply a subset of "publishers," thus in extending immunity for publisher liability, Congress was also extending liability for knowledge-based liability. Id. at 331-33. In Barrett, however, the First Appellate District of California reached another conclusion. Congress, in enacting § 230, was simply affording service providers and users liability under the strict, publisher liability—it was not, however, "abrogat[ing] the common law principle that one who republishes defamatory matter originated by a third person is subject to liability if he or she knows or has reason to know of its defamatory character." Barrett, 114 Cal. App. 4th at 1392 (citing Restatement (Second) of Torts, § 581(1)).

In upholding knowledge-based liability, the Barrett court correctly interpreted § 230. This is clear through the plain language of the statute and the policies that motivated Congress to enact § 230.

The statute itself states that providers and users of interactive computer services will not be treated "as a publisher or speaker" of any material that is provided by a third party content provider. 47 U.S.C. § 230(c). In wording the statute this way, Congress expressed the simple notion that providers and users of interactive computer services should not be classified, for purposes of liability, as publishers of material if it is supplied by a third party. In its very language, the statute expressly implicates only one of three possible common law classifications. Section 230(e)(3) goes on to specify that, "Nothing in this section shall be

construed to prevent any State from enforcing any State law that is consistent with this section."

Further, when Representative Cox first introduced this amendment to the CDA, which was titled "Online Family Empowerment," he referred to both the Cubby and Stratton Oakmont cases. Cox was particularly concerned about the classification of Prodigy as a publisher by virtue of its attempt to control the material on its website; he did not seem particularly troubled by the classification of Cubby as a distributor, however. 141 Cong. Rec. H8469, H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). In fact, the legislative record indicates that "[o]ne of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated providers and users as publishers or speakers of content that is not their own... ." H.R. Conf. Rep. No. 104-458 at 194, reprinted in 1996 U.S.C.C.A.N. 207, 207-08 (emphasis added). Had Congress wished to overturn the distributor classification in Cubby v. CompuServe, it could have done so expressly.

Section 230(b) states that one of the policies behind the statute is to remove disincentives for the development and utilization of blocking technology; i.e., to encourage self-policing. 47 U.S.C. § 230(b)(4). The Zeran decision has removed the incentive to self-police, however, by granting complete immunity to all interactive service providers and users transmitting material from a third party. If they cannot be held liable for the material on their sites, they have no incentive to remove it. Barrett, 114 Cal. App. 4th at 1403; see also Ian C. Ballon, Zeran v. AOL: Why the Fourth Circuit is Wrong, J. Internet L. (March, 1998).

The Zeran court was concerned that imposing knowledge-based liability on service providers and users will chill protected speech on the Internet. Zeran, 129 F. 3d. at 333. If consumers notify a service provider that material on their

site is defamatory, the burden of investigating the claim will be so great that the service provider will simply be forced to remove the material without confirming the claim. See Zeran, 129 F. 3d at 333. This in turn may lead to removal of protected speech. Id. It may also lead to claims against the service provider from parties whose material has been removed, or "set-up" frivolous claims by consumers. See id.

These concerns, however, are unfounded. First, scholars disagree with the Zeran court's assertion that investigating claims are a terrible burden on service providers, particularly because this only requires service providers to investigate after a claim is made. See Sheridan, supra at 175; Cordero, supra at 818-19.

Second, § 230 contains a provision that grants immunity to those service providers that choose to remove material in subsection (c)(2). This has a good faith element, so service providers won't simply remove every item that is questioned by a consumer. Sheridan, supra, at 176. But, third, if they do chose to remove the information, and do so in good faith, then they are immune from liability under § 230(c)(2).

And finally, fourth, if the service provider chooses not to remove material that is the basis of a claim, the consumer still must prove the elements of defamation. Even if the claim is successful, damages would be limited because most of the harm would occur before the service provider was given notice. Sheridan, supra, at 173.

Cremers is precluded from § 230 immunity under the knowledge-based liability standard because Petitioner has established, prima facie, that Cremers knew or had reason to know of the defamatory nature of Smith's e-mail. A statement is defamatory if "it tends to so harm the reputation of another as to lower him in the estimation of the community

or deter third persons from associating or dealing with him." Restatement (Second) of Torts, § 559.

The e-mail Cremers received from Smith, and subsequently posted to his web site and newsletter, stated the Petitioner "bragged to [Smith] about being the grand daughter of 'one of Hitler's right-hand men'...she said she was the descendent of Henrich Himmler." App. 65a. The message went on to claim that Smith believed that the "hundreds of European paintings on her walls, all with heavy carved wooden frames" were "looted during WWII and are the rightful legacy of the Jewish people." Id.

Given that nature of these claims, i.e., that the Petitioner was a proud relation of a well-known Nazi war criminal, and that she had inherited and still possessed Nazi-looted art, Cremers knew that the message would so harm the Petitioner's reputation as to "lower [her] in the estimation of the community or deter third persons from associating or dealing with [her]." Restatement (Second) of Torts, § 559. Further, to accuse the Petitioner of knowing possession of stolen property (Nazi-looted art) is to accuse the Petitioner of a crime—something Cremers would understand, given his status as an authority in this field of art crimes. Accusing a person of a crime is, in general, slander per se, because of its particularly damaging effects. These damaging effects would have been known to Cremers when he received the e-mail message, thus he knew or had reason to know of its defamatory nature.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE FIRST CIRCUIT; THE NINTH CIRCUIT ERRED IN GRANTING THE APPEAL.

In permitting Cremers's appeal, the Ninth circuit reasoned that an anti-SLAPP motion is akin to an immunity motion, therefore it is an appealable final order. The anti-SLAPP

"immunity" in this case, however, is for a private party engaged in private activities.

In Lovell v. One Bankcorp, et al., 878 F.2d 10 (1st Cir. 1989), the First Circuit considered a similar situation: a private party, engaged in private activities, was denied a motion to dismiss based on qualified immunity. The First Circuit refused to hear an interlocutory appeal, however, finding that the policies permitting an appeal of an order concerning immunity for government officials did not apply to private parties engaged in private activities.

This Court should grant certiorari to resolve this conflict between United States courts of appeal, and do so in favor of the First Circuit's interpretation.

a. Immediate Appeal is Not a Statutory Right for Orders Concerning Immunity-Like Provisions.

The right to appeal and appellate jurisdiction are "creatures of statute;" thus the appellant must show both that it has the right to appeal and that the appellate court can hear the appeal pursuant to a statutory grant of jurisdiction. U.S. v. Dior, 671 F.2d 351, 354 (C.A. Wash. 1982). In this case, appeals are governed by 28 U.S.C. § 1291. Section 1291 does not grant a statutory right to immediate appeal for orders concerning immunity-type orders. Rather, appellant must satisfy the requirement of "finality." See 28 U.S.C § 1291.

b. The Denial of the Anti-SLAPP Motion to Strike is Not Final Under the Collateral Order Doctrine.

Under the Collateral Order Doctrine, an order is a final, appealable order only if the order is (1) conclusive, (2) separate from the merits of the case, and (3) effectively unreviewable upon appeal. Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (U.S. 1989). In this case, the

Ninth circuit erred in finding that the order denying the anti-SLAPP motion is conclusive and unreviewable upon appeal.

i. The district court's order is not conclusive.

In finding that the district court's order denying the anti-SLAPP motion is conclusive, the Ninth Circuit reasoned "If an anti-SLAPP motion to strike is granted, the suit is dismissed.... If the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation...The district court's denial of Cremers's motion to strike resolved the threshold question whether Batzel's defamation suit would be dismissed by pre-trial motion" App. 25a (internal citations omitted).

The court's reasoning is flawed because it fails to distinguish orders denying anti-SLAPP motions from other interlocutory orders that are not immediately appealable.[4] In this very case, the Ninth Circuit refused to hear Cremers' appeal of the district court's order denying his motion to dismiss for lack of personal jurisdiction, in part because that is a question "that can may be reviewed adequately on appeal from final judgment." App. 23a n.6. But the court's reasoning could be applied to the issue of personal jurisdiction: If a motion to dismiss for lack of personal jurisdiction is granted, the suit is dismissed...If it is denied, the court has personal jurisdiction, and the parties may proceed with the litigation.

This analysis can only expand the Collateral Order Doctrine. But behind the "final decision" requirement of

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[4] Interlocutory orders that are commonly not considered final orders and therefore not appealable under the Collateral Order Doctrine include: motion to dismiss for lack of jurisdiction, motion to dismiss for failure to state a claim, an order changing venue, etc. Ulrich et al., Federal Appellate Practice Guide § 3.5 (Lawyers Cooperative Publishing 1994).

§1291 is "a strong congressional policy against piecemeal reviews." In re Subpoena Served on California Pub. Utils. Comm'n, 813 F.2d 1473, 1475 (9th Cir. 1987); the Collateral Order Doctrine is a "narrow exception" to the final judgment rule, and must be so applied. Midland Asphalt Corp., 489 U.S. at 798. Conclusiveness, therefore, must mean more than simply determining that if a motion is granted, then the suit will be dismissed, and if it is denied, the suit will proceed.

In this case, the order is not conclusive. An anti-SLAPP motion simply looks at the probability of a plaintiff's success on the merits. If the court determines that the plaintiff has established a probability that he or she will prevail, it has not conclusively determined that a plaintiff will in fact prevail; in fact, the determination is not admissible at any later stage in the case, nor does it affect the burden of proof. Cal. Civ. Proc. Code § 425.16(b)(3) (2001). Thus, the court has not conclusively determined the disputed question, it has simply permitted the plaintiff to continue with her claim.

ii. The district court's order is not "unreviewable upon final judgment."

The Ninth Circuit also erred in finding that the order denying the anti-SLAPP motion is unreviewable upon final judgment. In making this determination, the court stated that "if the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion," then a decision by the appellate court reversing the district court's denial of the motion would not remedy the fact that "the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression." App. 27a.

As with the conclusiveness test, this analysis can be applied to several types of interlocutory appeals; however the courts have limited immediate appeals in these situations,

despite a concern about litigating meritless claims. For example, an order denying a motion to dismiss for failure to state a claim is not appealable before final judgment. See Ulrich, et al., supra § 3.5. But a motion to dismiss for failure to state a claim could be substituted into the Ninth Circuit's above analysis: If the defendant were required to wait until final judgment to appeal the denial of a meritorious motion to dismiss for failure to state a claim, a decision by the appellate court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim.

Further, the policies behind granting immediate appeal of orders denying immunity do not apply in this case. Courts will grant immediate appeal of orders denying immunity when the denial of immunity would risk "subjecting government or public officials to distractions from their official governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Mitchell v. Forsyth, 472 U.S. 526, 526 (U.S. 1985). In such a case, qualified immunity for government officials is "effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526.

Such public policy concerns are clearly not at stake in this case. Cremers is not a public or governmental official; he is simply a private individual, engaged in private activity. Requiring Cremers to stand trial will not disrupt government services, inhibit the discretionary actions of a public or governmental official, or, "deter[] able people from public service." Rather, this case is similar to Lovell, wherein the First Circuit held that the right to immediate appeal did not apply to an order denying qualified immunity to a commercial entity. The court reasoned that Forsyth turned upon the "harm done to effective government and to government officials when the right of the official not to stand trial was violated," and that such concerns were not present in the

case. Lovell, 878 F.2d at 12 (emphasis added). The defendant was not a government official, and the actions that led to the claim against him did not take place in the course of performance of public duties. Id. Instead, he was an officer in a private bank, engaged in private, commercial activity. Id. The court further reasoned

> If a private party [ ] is entitled to bypass the rule against piecemeal review, one might wonder why any private person raising unsuccessfully a defense which, if meritorious, would confer victory prior to trial, should not also be granted an interlocutory appeal. Yet to do so would be to undermine, almost beyond repair, the policies that support the finality principle.

Id. at 13 (emphasis added).

The exact same concern applies here. If Cremers is permitted to appeal this interlocutory order, it will expand the Collateral Order Doctrine such that the exception shall swallow the rule.

CONCLUSION

The Petitioner respectfully submits that the Ninth Circuit erred in the following ways:

(1) Holding that Cremers did not develop the defamatory message, even though in an effort to create content for his web site over which he had absolute control of content, he pulled from his inbox a private e-mail from a stranger that contained obviously defamatory statements, made changes to the message, posted it on his web site, and forwarded it to over 1,000 electronic newsletter recipients, thereby knowingly disseminating the defamatory statements.

(2) Holding that the standard for whether information content has been provided by another focuses on the reasonable belief of the recipient of the e-mail, rather than the author.

(3) Failing to classify Cremers as a "knowing distributor" of the defamatory statements, and thereby making him subject to liability under the common law, knowledge-based liability standard applicable to "distributors," rather than as a "publisher."

(4) Holding that the district court's interlocutory order denying Cremers's anti-SLAPP motion is a final order for purposes of the Collateral Order Doctrine, although the effect of the order is the same as his motion to dismiss for lack of personal jurisdiction, and although Cremers is a private party engaged in exclusively private activity, such that his standing trial will not negatively affect the efficient administration of government or deter able people from public service.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56380, No. 01-56556

[Filed December 3, 2003]

ELLEN L. BATZEL, a citizen of the State of California,
Plaintiff-Appellee,

v.

ROBERT SMITH, a citizen of the State of North Carolina; NETHERLANDS MUSEUMS ASSOCIATION, an entity of unknown form; MOSLER, INC., a Delaware corporation with its principal place of business in Ohio,
Defendants,

and,

TON CREMERS, a citizen or subject of the Netherlands,
Defendant-Appellant.

ELLEN L. BATZEL, a citizen of the State of California,
Plaintiff-Appellant,

v.

ROBERT SMITH, a citizen of the State of North Carolina;

NETHERLANDS MUSEUMS ASSOCIATION, an entity of unknown form; TON CREMERS, a citizen or subject of the Netherlands; MOSLER, INC., a Delaware corporation with its principal place of business in Ohio,

Defendants-Appellees.

Before: William C. Canby, Jr., Ronald M. Gould, and Marsha S. Berzon, Circuit Judges.

Order;
Partial Concurrence and Partial Dissent by Judge Gould

ORDER

The majority of the panel has voted to deny appellee's petition for rehearing. Judge Berzon has voted to deny the petition for rehearing en banc and Judge Canby so recommends. Judge Gould has voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The majority of the active judges have voted to deny rehearing the matter en banc. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are DENIED. Judge Gould's dissent from denial of en banc rehearing is filed concurrently herewith.

GOULD, Circuit Judge, with whom Circuit Judges TALLMAN and CALLAHAN join, dissenting from denial of rehearing en banc:

I dissent from the denial of en banc review of this case. I remain convinced that the panel majority's interpretation of the statutory immunity found in 47 U.S.C. § 230(c) is wrong in light of Congress's intent, and will needlessly harm persons defamed on the Internet. Section 230(c) states: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Immunity thus requires, *inter alia*, that the communication must have been "information provided by another information content provider." "[I]nformation content provider," in turn, is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(e)(3).

The panel agreed that if a person who posted defamatory material on the Internet "develop[ed]" that material, that person would become the information content provider of the material and lose § 230(c) immunity. The panel majority held that Cremers did not "develop[ ]" the information by "merely editing portions of [Smith's] e-mail and selecting [it] for publication." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).[1]

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[1] The panel majority held that § 230(c) requires proof that the person who submitted the information "provided" it for purposes of republication and that a publisher falls outside of the scope of § 230(c) immunity if the publisher could reasonably perceive that the provider of the information did not intend that it was "provided" for republication.

The panel majority's conclusion that pre-publication selection and editing is not "development" is not supported by the text, history, or precedent surrounding § 230(c). Initially, any entity that "creat[es]" *or* "develop[s]" information is an "information content provider." 47 U.S.C. § 230(e)(3). To avoid rendering "creation" superfluous, "development" must mean adding to or improving the information initially created by another "information content provider." Development is defined as "a change in the course of action or events or in conditions; a state of advancement; an addition; an elaboration." The New Shorter Oxford English Dictionary 654 (Thumb Index ed. 1993). *See also www.m-w.com* (definition of "develop" includes "1b: to make visible or manifest" and "3b(1): to make available or usable"). The ordinary usage of a "development" of information suggests change in, addition to, or novel presentation of, the information.

There should be little doubt, given ordinary usage that Congress presumably intended, that a publisher's affirmative choice to select certain information for publication for the first time on the Internet "develops" that information. To put the point more concretely, imagine a defamatory e-mail sent to both an on-line bulletin board[2] for appellate litigation and to a popular appellate litigation blog.[3] Let us say, for example,

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[2] An on-line bulletin board allows users to post messages on a central server and it allows any other person with access to the bulletin board to read that post. *Batzel*, 333 F.3d at 1027, n.9.

[3] To mention a few popular and respected legal blogs, see, for example, *How Appealing, www.appellateblog.blogspot.com, SCOTUSBlog, www.goldsteinhowe.com/blog/index.cfm, The Volokh Conspiracy, volokh.com* and *Lessig Blog, www.lessig.org/blog/*. The development argument is likely to hold true in other industries

that the e-mail falsely stated that Judge X of the Y Circuit was paid by Z to render decisions in Z's favor. If the blogger decides to publish the e-mail, there is something qualitatively different about the e-mail as published on the appellate blog, as contrasted with the one posted on the bulletin board. The blogger's conscious decision to publish an e-mail would add, by virtue of his or her reputation and that of the blog, a layer of credibility and endorsement that would be lacking from the e-mail merely posted to the bulletin board. And being the first person to post the defamatory material on the Internet would be a novel presentation of the defamatory material.

The panel majority agrees that if Cremers "developed" the defamatory content, he would lose § 230(c) immunity. The question is whether Cremers' actions are a development of the information. Similar to the blog hypothetical above, Cremers' actions constituted a change in, addition to, and novel presentation of, the information. Cremers changed Smith's e-mail (by deleting the key word "some" describing the inherited art-work) and provided a novel presentation thereof by formatting it for Cremers' e-mail newsletter. Moreover, Cremers added what credibility he and his organization may have had to Smith's bare allegations when Cremers selected and published Smith's e-mail. And posting the message on the Internet, as Cremers did, is a novel presentation of the information because Smith, as original sender, had not posted it. Cremers' decision to select, edit, and publish Smith's e-mail in an edition of the Museum Security Network's newsletter was a change in, an addition to, and a novel presentation of what Smith had already written.

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as well, including politics, *www.instapundit.com*, and *software architecture, www.corfield.org/blog*.

To bolster the incorrect theory that "development" does not include editing information or selecting that information for publication, the panel majority points to Congress's "exclusion of 'publisher' liability," *Batzel*, 333 F.3d at 1031, and argues that "development" does not include the exercise of traditional editorial functions. *Id.* However, this reading omits a key qualification within § 230(c); namely that immunity is provided for claims that "treat[ ]" the defendant as a publisher. This method of using the word "publisher" does not at all imply that Congress intended to immunize all of the functions exercised by a "publisher" as asserted by the panel majority, but that the only immunity Congress intended to provide was immunity from defamation-type claims. *Cf. Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) ("the terms 'publisher' and 'distributor' " in § 230(c) "derive their legal significance from the context of defamation law."). In the defamation context, "publisher" has a broad meaning that includes any person who automatically republishes or distributes the defamatory material. *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113 (5th ed. 1984). "Publisher" in the context of § 230(c) must be read to encompass the broad meaning of "publisher" in defamation law.[4] Thus, "publisher" was meant to define the type of *claim* that § 230(c) would immunize — e.g., a claim alleging defamation must prove the element of "publication" — not to define the meaning of "development" as found in § 230(e)(3). All claims that require proof of publishing or speaking (traditionally, libel and slander) would

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[4] This conclusion is further warranted because Congress immunized defendants who are "treated as publisher or *speaker*. . ." implying that all written ("publisher") and oral ("speaker") defamation-type claims were to be covered. 47 U.S.C. § 230(c) (emphasis added).

be immunized because the plaintiff could not "treat[ ]" the defendant as "publisher or speaker." On the other hand, claims that do not require proof of publication are not, and should not be, immunized.[5] Because Congress limited immunity only to claims that require proof of the defendant being a publisher or a speaker, it is incorrect to hold that Congress intended that the word "publisher" in § 230(c) be used to shed light on when information content is sufficiently "developed" by the publisher to prevent it from being "information provided by another information content provider."[6]

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[5] *Cf. Mainstream Loudoun v. Bd. of Trs.*, 2 F. Supp. 2d 783 (E.D. Va. 1998) (§ 230 immunity did not extend to a claim under 42 U.S.C. § 1983 that a library blocking access to adult web sites (a traditional editorial function) violated the library users' free speech rights).

[6] If Congress wanted to use this more specialized meaning of the word "development," as opposed to the ordinary meaning as previously described, it could have done so in the § 230(3) "[d]efinitions" section. Congress's deliberate silence on the definition of "development" should lead us to conclude that Congress intended for us to employ an ordinary meaning of development. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (courts should follow ordinary usage of terms unless Congress gives them a specified or technical meaning); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988) (courts should follow the dictionary definition of terms, unless Congress has provided a specific definition). These principles, of course, should lead us to reject the majority's explanation that (1) Congress intended a definition of "development" that excluded traditional editorial functions and (2) Congress chose to demonstrate this intent by using the word "publisher" in § 230(c) rather than, less deviously, defining "development" in § 230(e). The panel

Further, it is not as if the panel reached this result by simply following the holdings of other circuits. Make no mistake: the panel majority coldly goes where no circuit court has gone before, reaching further and providing broader automatic immunity of the most callous and damaging defamation that anyone might maliciously post on the Internet. The majority cites four out-of-circuit cases for the proposition that "development" does not include the exercise of traditional editorial functions. *Batzel*, 333 F.3d at 1031 n.18. These cases have no persuasive force in assessing Batzel's claim against Cremers. None of these cases dealt with similar facts, and none address the question of whether the pre-publication selecting and editing of another entity's information is a "development" of information, which would place the selector or editor outside the statutory immunity declared by Congress. Each of the four cases involved the actual or potential editing or removing of posted information after the information had already been posted on the Internet.[7]

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majority's theory makes sense if Congress routinely played "hide the ball," but observers of the legislative process in the United States know that legislators and Congressional committees do all that they can to explicate the meaning and extent of what they legislate. We should not tread the majority's path, because here there is no reason not to abide the plain meaning of the statutory text. *See, e.g., United States v. Providence Drilling Co.*, 485 U.S. 693, 700-01, 108 S. Ct. 1502, 99 L. Ed. 2d 785 (1988).

[7] *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) held that AOL was immune under § 230(c) against the claim that it had failed to remove defamatory messages posted on an AOL bulletin board by an unknown third party, refused to post retractions, and failed to screen for similar postings thereafter. In *Zeran*, the third party was completely responsible for the content of the bulletin board posts. AOL selected nothing to be published on the Internet.

No federal court of appeals, save the panel majority in *Batzel*,

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In *Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), AOL published continuously updated stock quotation information based upon information provided by two independent third parties. AOL was determined to be immune under § 230(c), although AOL had informed the third parties of data errors and had removed erroneous data from the website after the information had been posted. Thus, AOL selected nothing to be posted, and the only "editorial function" exercised by AOL was deletion after the unadulterated information had already been posted.

In *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), AOL was held immune under § 230(c) because plaintiffs could provide no factual support for the assertion that "AOL . . . had some role in the writing or editing the material in the Drudge Report." AOL did have the right (apparently never exercised) to remove content, direct [Drudge] to remove content, or require reasonable changes to content. Thus, "AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried. . . ." *Id.* at 50. AOL conceded that parties could be joint information content providers, providing the examples of joint authors, and a lyricist and a composer. It is an apt analogy to say that the relationship of Smith and Cremers as similar to that of lyricist (Smith) and composer (Cremers).

Finally, in *Schneider v. Amazon.com, Inc.*, 108 Wn. App. 454, 31 P.3d 37 (Wash. 2001), the court held that Amazon.com was immune under § 230(c). A third party had posted defamatory comments of a forum where visitors could voice their opinions about the book. While Amazon had the right to edit or remove postings that violated published guidelines and had a "royalty-free right to use the review," Amazon was determined to not be an information content provider. Neither of these factors address the effect of pre-publication selection and editing of defamatory material.

has ever held that statutory immunity should be given for the pre publication selection and posting of harshly defamatory material.[8]

It is one thing to say, as all of the cited cases have said, that Congress wanted to preserve the ability of a website operator to edit something posted by another, thereby diminishing harm to the public when defamation or harmful material are excised. It is quite another, and diametrically opposed to what Congress had in mind, to hold, as the panel majority mistakenly held, that Congress intended to immunize someone like Cremers who first places on the Internet a patently defamatory missive that the sender had not even aimed for Internet publication.

Finally, the panel majority argues that there is no functional difference between a selection and a screening approach, rendering the addition of Cremers' credibility moot. *Batzel*, 333 F.3d at 1032. But Congress recognized this difference when it granted immunity for good faith actions to "restrict availability" of objectionable material. Congress knew the difference between screening (or "restricting availability") and selecting (or providing availability).[9]

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[8] Even more recent decisions do not address the precise question of pre-publication selection and editing, but instead focus on post-publication editing and/or screening. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003). *Batzel* remains the only case to address the "development" question.

[9] Specifically, the statute provides immunity for "any action voluntarily taken in good faith to restrict access to or availability of material. . ." 47 U.S.C. § 230(c)(2)(A). This presupposes that the information is already posted or would be posted but for

Moreover, the panel majority's argument is flawed by the fact that a screening approach leads to the inclusion on the Internet of more material than a selection approach, and less of an endorsement.[10] This demonstrates the difference between

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intervention by screening. Unless the offensive materials were already posted, how else could one talk about restricting access or availability? The majority asserts that by not selecting information for publication, availability is restricted. But when a person *selects and posts information* never posted before, that is promoting access, not restricting access, to material.

[10] The panel majority's argument that the dissent's position cannot logically co-exist with immunity for those who edit data posted by others on a website virtually ignores Congress's intent and doesn't follow Congress's language. The majority would have to say that there are only two categories of information available to an Internet publisher: publishable information and not publishable information. If that were true, the information published will be the same regardless of whether one selects or screens. However, in the real world there are several types of information available to a publisher, including: (1) information that the publisher wants to publish; (2) information that the publisher does not affirmatively want published, but is willing to allow others to publish on the publisher's web site; and (3) information that the publisher does not want published. It is with respect to the second category that the difference between selection and screening is a difference that counts: A selection approach yields *only* the information in category (1) while a screening approach yields the information in *both* categories (1) and (2). The result of using a different approach toward the information provided by another generates different sets of information that are ultimately published. Thus, it is illogical for the majority to say that there is no difference between an inclusion (selection) and exclusion (screening) approach to publishing third-party information on the Internet. And, of course, when we look at Congress's language and intent, it is clear that Congress recognized this difference.

selection and screening that Congress recognized: Screeners of matters posted by others get immunity; those who select what is posted do not. Section 230 demonstrates a clear Congressional intent to immunize screening and post-publication removal, but shows no corresponding Congressional intent to immunize pre-publication selection and editing.[11] This line, drawn by Congress, is sensible, easy to defend, and easy to apply. By contrast, the line drawn by the majority is not sensible, cannot be defended, and will be difficult to define in proceedings related to what a recipient "reasonably" understood a sender to want, especially since immunity questions arise at the beginning of litigation. Congress provided immunity for web site operators who edit or remove what another has placed on the Internet. But Congress did not provide for immunity for web site operators who place, for the first time, defamatory information on the Internet.

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[11] The majority argues that § 230 does not specify a preference for screening and post-publication removal, but that argument is incorrect. *See supra* note 9; 47 U.S.C. § 230(b)(3) (noting Congressional policy to encourage the development of user based blocking software); *id.* at § 230(b)(4) (stating the policy of removing disincentives to the development and utilization of blocking and filtering technologies). By contrast, the statutory text does not show any preference for or acknowledgment of selection. The legislative history points to the same conclusion. *See* 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (remarks of Rep. Goodlatte that there is a disincentive to "detect[ ] and remov[e] objectionable content."); *Batzel*, 333 F.3d at 1029-30 (noting that § 230(c) was intended to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), where Prodigy used filing software and post-publication removal and was held liable for defamatory material posted on a bulletin board that Prodigy was monitoring).

Not only is the majority's interpretation unfaithful to the statutory text, it opens the door for any Internet publisher to amplify the defamatory words of any person who communicates, or reasonably seems to communicate, a desire that their defamatory missive be published. It can only be imagined that a malicious sender of defamatory material will *want* the publisher to post the information. Thus, in the worst cases of malicious defamation, the defamer will only be too happy to ask expressly for publication to spread damaging lies and accomplish an illicit purpose. In such a case, under the majority's non-test, the publisher surely would reasonably think that publication was intended, and immunity would surely and automatically follow, no matter how false and defamatory the content.

The most blatant and malicious defamers doubtless would request publication of their poisoned words on a blog or other publication with a large audience. History, as well as this case, tells us that such persons exist and that they will seek an audience for defamation. And if immunity automatically follows, why would any Internet publisher refuse to publish anything that might draw eyes to the website? Doubtless some would decline out of virtue, but others will almost certainly publish what brings profit.[12] None of this would do any good

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[12] Although defamation might be bad enough amplified by blogs and newsletters, imagine the damage if it were amplified by the Internet portal of a major news organization, e.g., *www.cnn.com*, *www.msnbc.com,* or *www.foxnews.com*. We might hope that these organizations would be responsible and not amplify the defamatory message to a world-wide audience. But, apart from the protections mandated by the First Amendment, *see, e.g., New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the panel majority has demolished any remaining legal and financial incentive for these major news outlets to be responsible with what

for the person defamed within the lawless territory that the majority would make of the Internet.

I do not believe that Congress intended to make, or ever would consciously make, the policy choice made by the panel majority.[13] Human reputations, built on good conduct over decades, should be not so easily tarnished and lost in a second of global Internet defamation. Under the panel majority's rule, there might be a remedy against the initial sender, but there is no remedy against the person who willingly chooses, with no exercise of care, to amplify a malicious defamation by lodging it on the Internet for all persons and for all time. Unless this result were commanded by Congress, we should not create such a system.

The panel majority's decision is not faithful to Congressional intent, will have a broad and potentially harmful impact in cases of misuse of the Internet, and should have been reconsidered by our entire court. I respectfully dissent from our decision not to do so.

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they publish on their Internet portals.

[13] In light of these concerns, a well-known and respected commentator has critiqued the panel majority's holding, *see, e.g.*, John Dean, *Defamation Immunity on the Internet: An Evolving Body of Law Has Been Stretched Beyond Its Limits* (July 4, 2003), *available at http://writ.findlaw.com/dean/20030704.html.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 01-56380, 01-56556

Filed: [June 24, 2003]

ELLEN L. BATZEL, a citizen of the State of California,
Plaintiff-Appellee,

v.

ROBERT SMITH, a citizen of the State of North Carolina; NETHERLANDS MUSEUMS ASSOCIATION, an entity of unknown form; MOSLER, INC., a Delaware corporation with its principal place of business in Ohio,
Defendants,

and,

TON CREMERS, a citizen or subject of the Netherlands,
Defendant-Appellant.

ELLEN L. BATZEL, a citizen of the State of California,
Plaintiff-Appellant,

v.

ROBERT SMITH, a citizen of the State of North Carolina; NETHERLANDS MUSEUMS ASSOCIATION, an entity of

unknown form; TON CREMERS, a citizen or subject of the Netherlands; MOSLER, INC., a Delaware corporation with its principal place of business in Ohio,

Defendants-Appellees.

Before: William C. Canby, Jr., Ronald M. Gould, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon,
Partial Concurrence and Partial Dissent by Judge Gould

BERZON, Circuit Judge:

There is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world. Congress, however, has chosen for policy reasons to immunize from liability for defamatory or obscene speech "providers and users of interactive computer services" when the defamatory or obscene material is "provided" by someone else. This case presents the question whether and, if so, under what circumstances a moderator of a listserv and operator of a website who posts an allegedly defamatory e-mail authored by a third party can be held liable for doing so. The case also presents a novel procedural question – whether the denial of an Anti-SLAPP suit filed pursuant to California law can be appealed prior to a final judgment in the underlying case. After recounting the unusual tale underlying this case, we address each of these questions in turn.

I.

In the summer of 1999, sometime-handyman Robert Smith was working for Ellen Batzel, an attorney licensed to practice

in California and North Carolina, at Batzel's house in the North Carolina mountains. Smith recounted that while he was repairing Batzel's truck, Batzel told him that she was "the granddaughter of one of Adolf Hitler's right-hand men." Smith also maintained that as he was painting the walls of Batzel's sitting room he overheard Batzel tell her roommate that she was related to Nazi politician Heinrich Himmler. According to Smith, Batzel told him on another occasion that some of the paintings hanging in her house were inherited. To Smith, these paintings looked old and European.

After assembling these clues, Smith used a computer to look for websites concerning stolen art work and was directed by a search engine to the Museum Security Network ("the Network") website. He thereupon sent the following e-mail message to the Network:

> From: Bob Smith [e-mail address omitted]
>
> To: securma@museum-security.org [the Network][1]
>
> Subject: Stolen Art
>
> Hi there,
>
> I am a b[illegible]ding contractor in Asheville, North Carolina, USA. A month ago, I did a remodeling job for a woman, Ellen L. Batzel who bragged to me about being the grand daughter [sic] of 'one of Adolph Hitler's right-hand men.' At the time, I was concentrating on performing my tasks, but upon

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[1] We are including this e-mail address because the precise e-mail address used is relevant to our later discussion.

reflection, I believe she said she was the descendant of Heinrich Himmler.

Ellen Batzel has hundreds of older European paintings on her walls, all with heavy carved wooden frames. She told me she inherited them.

I believe these paintings were looted during WWII and are the rightful legacy of the Jewish people. Her address is [omitted].

I also believe that the descendants of criminals should not be persecuted for the crimes of the [sic] fathers, nor should they benefit. I do not know who to contact about this, so I start with your organization. Please contact me via email [. . .] if you would like to discuss this matter.

Bob.

Ton Cremers, then-Director of Security at Amsterdam's famous Rijksmuseum and (in his spare time) sole operator of the Museum Security Network ("the Network"), received Smith's e-mail message. The nonprofit Network maintains both a website and an electronic e-mailed newsletter about museum security and stolen art. Cremers periodically puts together an electronic document containing: e-mails sent to him, primarily from Network subscribers; comments by himself as the moderator of an on-line discussion; and excerpts from news articles related to stolen works of art. He exercises some editorial discretion in choosing which of the e-mails he receives are included in the listserv mailing, omitting e-mails unrelated to stolen art and eliminating other material that he decides does not merit distribution to his subscribers. The remaining amalgamation of material is then posted on the

Network's website and sent to subscribers automatically via a listserv.[2] The Network's website and listserv mailings are read by hundreds of museum security officials, insurance investigators, and law enforcement personnel around the world, who use the information in the Network posting to track down stolen art.

After receiving it, Cremers published Smith's e-mail message to the Network, with some minor wording changes, on the Network listserv. He also posted that listserv, with Smith's message included, on the Network's website. Cremers later included it on the Network listserv and posted a "moderator's message" stating that "the FBI has been informed of the contents of [Smith's] original message."

After the posting, Bob Smith e-mailed a subscriber to the listserv, Jonathan Sazonoff, explaining that he had had no idea that his e-mail would be posted to the listserv or put on the web. Smith told Sazanoff:

> I [was] trying to figure out how in blazes I could have posted me [sic] email to [the Network] bulletin board. I came into MSN through the back door, directed by a search engine, and never got the big picture. I don't remember reading anything about a message board

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[2] "A listserv is an automatic mailing list service that amounts to an e-mail discussion group . . . . Subscribers receive and send messages that are distributed to all others on the listserv . . . . Messages may be automatically posted to the listserv or filtered through the list owner (who may elect not to post messages that are off topic or inappropriate). A listserv, unlike a newsgroup, involves one-to-many messaging, rather than the use of distributed message databases." Ian C. Ballon, E-Commerce and Inter-net Law: Treatise with Forms, Glossary of Terms, at 30 (2001).

> either so I am a bit confused over how it could happen. Every message board to which I have ever subscribed required application, a password, and/or registration, and the instructions explained this is necessary to keep out the advertisers, cranks, and bumbling idiots like me.

Batzel discovered the message several months after its initial posting and complained to Cremers about the message. Cremers then contacted Smith via e-mail to request additional information about Smith's allegations. Smith continued to insist on the truth of his statements. He also told Cremers that if he had thought his e-mail "message would be posted on an international message board [he] never would have sent it in the first place."

Upon discovering that Smith had not intended to post his message, Cremers apologized for the confusion. He told Smith in an e-mail that "[y]ou were not a subscriber to the list and I believe that you did not realize your message would be forwarded to the mailinglist [sic]." Apparently, subscribers send messages for inclusion in the listserv to securma@x54all.nl, a different address from that to which Smith had sent his e-mail contacting the Network. Cremers further explained that he "receive[s] many e-mails each day some of which contain queries [he thinks] interesting enough to forward to the list. [Smith's] was one of those."

Batzel disputes Smith's account of their conversations. She says she is not, and never said she is, a descendant of a Nazi official, and that she did not inherit any art. Smith, she charges, defamed her not because he believed her artwork stolen but out of pique, because Batzel refused to show Hollywood contacts a screenplay he had written.

Batzel claims further that because of Cremers's actions she lost several prominent clients in California and was investigated by the North Carolina Bar Association. Also, she represents that her social reputation suffered. To redress her claimed reputational injuries she filed this lawsuit against Smith, Cremers, the Netherlands Museum Association,[3] and Mosler, Inc. ("Mosler")[4] in federal court in Los Angeles, California.

Cremers countered with two motions: (1) a motion to strike under the California anti-SLAPP statute,[5] alleging that Batzel's suit was meritless and that the complaint was filed in an attempt to interfere with his First Amendment rights, and (2) a motion to dismiss for lack of personal jurisdiction. The court denied both motions. Cremers then filed this appeal.

Batzel also alleged in her complaint that Mosler was vicariously liable for her reputational injuries because Cremers was acting as Mosler's agent. This agency relationship arose, according to Batzel, because Mosler gave Cremers $8,000 for displaying Mosler's logo and other advertisements on the Net-work website and in its listserv. The district court entered summary judgment in favor of Mosler, ruling that, under California law as applied to the undisputed facts, Cremers was not an agent of Mosler and

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[3] The Association is described in the complaint as "a business entity of unknown form" in the Netherlands. The Association is not involved in the present appeal.

[4] Mosler is an Ohio based company that manufactures security devices.

[5] Cal. Civ. Proc. Code § 425.16.

Mosler could not be vicariously liable. Batzel appeals this decision as well.

II

The district court denied Cremers's motion to dismiss for lack of personal jurisdiction on June 5, 2001. Cremers's notice of appeal, which sought to appeal that order along with the district court's denial of Cremers's anti-SLAPP motion, was filed on July 27, 2001. No extension of time to appeal was sought or granted. The appeal of the June 5 order accordingly is untimely because it was not filed within thirty days of that order. Fed. R. App. P. 4(a)(1)(A).

It is understandable that Cremers did not promptly appeal the denial of his motion to dismiss for lack of personal jurisdiction, because the denial was not an appealable order. *See Catlin v. United States*, 324 U.S. 229, 236, 65 S. Ct. 631, 89 L. Ed. 911 (1945). Cremers argues, however, that we should review the denial of his motion to dismiss for lack of personal jurisdiction as an issue pendent to his appeal of the denial of his anti-SLAPP motion.

Although our circuit permits the exercise of appellate jurisdiction over otherwise non-appealable orders that are "inextricably intertwined" with another order that is properly appealable, *see, e.g., Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1296-97 (9th Cir. 1999), we have interpreted "inextricably intertwined" very narrowly for that purpose. *See Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000). We require that the two issues: "(a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal ... or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue."

Id. at 1285 (internal citations omitted). The attempted appeal of the denial of the motion to dismiss for lack of personal jurisdiction fails both requirements. We can decide the anti-SLAPP issue entirely independently of the question of personal jurisdiction, and different legal standards apply to each issue. *See id.* We therefore dismiss Cremers's appeal insofar as it challenges the denial of his motion to dismiss for lack of personal jurisdiction.[6]

III

A. *California's Anti-SLAPP Statute*

California law provides for pre-trial dismissal of "SLAPPs": "Strategic Lawsuits against Public Participation." Cal. Civ. Proc. Code § 425.16. These are lawsuits that "masquerade as ordinary lawsuits" but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so. *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816, 33 Cal. Rptr. 2d 446 (1994), *overruled on other grounds by Equilon Enter. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002) (citations omitted). "The anti-SLAPP statute was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001).

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[6] Cremers's notice of appeal requests in the alternative that we treat the notice of appeal as a petition for mandamus. So treated, we deny the petition because the question is one that may be reviewed adequately on appeal from final judgment. *See Bauman v. United States Dist. Ct.*, 557 F.2d 650, 657 (9th Cir. 1977).

If the defendant files an anti-SLAPP motion to strike, all discovery proceedings are stayed. *See* § 425.16(g). A court may, however, permit specified discovery "on noticed motion and for good cause shown." *Id.* In order to prevail on an anti-SLAPP motion, the defendant is required to make a prima facie showing that the plaintiff's suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States or California Constitution. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971 (9th Cir. 1999); *see also* § 425.16(e) (defining "act in furtherance of a person's right of . . . free speech.").

The burden then shifts to the plaintiff to establish a reasonable probability that the plaintiff will prevail on his or her defamation claim. *See Lockheed*, 190 F.3d at 971. "[T]he plaintiff must demonstrate that 'the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is [sic] credited.'" *Metabolife*, 264 F.3d at 840 (quoting *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 33 Cal.Rptr.2d 446, 454).

If the court denies an anti-SLAPP motion to strike, the parties continue with discovery. *See* § 425.16(g). Once the plaintiff's case has survived the motion, the anti-SLAPP statute no longer applies and the parties proceed to litigate the merits of the action.

B. *Jurisdiction*

We are presented with the threshold question whether we have jurisdiction over Cremers's interlocutory appeal of the district court's denial of his motion to strike. In California state court, a denial of an anti-SLAPP motion is immediately

appealable. *See* § 425.16(j). The issue before us as a federal court is whether a district court's denial of an anti-SLAPP motion is an immediately appealable "final decision" under 28 U.S.C. § 1291, so that we have jurisdiction to address Cremers' appeal. We conclude that we have jurisdiction to review the denial of an anti-SLAPP motion pursuant to the collateral order doctrine.

In general, a party is entitled only to a single appeal, to be "deferred until final judgment has been entered." *See Digital Equip. Corp. v. Desktop Direct*, Inc., 511 U.S. 863, 868, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994). The collateral order doctrine establishes "a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system nonetheless be treated as final." *Id.* at 867 (internal citations and quotation marks omitted). To fall into this narrow class of immediately appealable orders, a district court decision must (1) be "conclusive," (2) "resolve important questions completely separate from the merits," and (3) "render such questions effectively unreviewable on appeal from a final judgment in the underlying action." *Id.*

In the present case all three factors are met. First, the court's denial of Cremers's anti-SLAPP motion is conclusive as to whether the anti-SLAPP statute required dismissal of Batzel's suit. If an anti-SLAPP motion to strike is granted, the suit is dismissed and the prevailing defendant is entitled to recover his or her attorney's fees and costs. *See* § 425.16(c). If the motion to strike is denied, the anti-SLAPP statute does not apply and the parties proceed with the litigation.

The district court's denial of Cremers's motion to strike resolved the threshold question whether Batzel's defamation suit should be dismissed by pre-trial motion. Denial of an

anti-SLAPP motion resolves a question separate from the merits in that it merely finds that such merits may exist, without evaluating whether the plaintiff's claim will succeed. *See* § 425.16(b)(3) ("If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case . . . ."). The purpose of an anti-SLAPP motion is to determine whether the defendant is being forced to defend against a meritless claim. The anti-SLAPP issue therefore exists separately from the merits of the defamation claim itself.

Because the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression, the district court's denial of an anti-SLAPP motion would effectively be unreviewable on appeal from a final judgment. We find it instructive that California's anti-SLAPP statute provides that an order denying an anti-SLAPP motion may be appealed immediately. *See* § 425.16(j). This provision, along with the legislative history behind § 425.16, demonstrates that California lawmakers wanted to protect speakers from the trial itself rather than merely from liability. As the California Senate Judiciary Committee noted before the law's enactment,

> Without [the right of immediate appeal], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated . . . . [W]hen a meritorious anti-SLAPP motion is denied, the defendant, under current law, has only two options. The first is to file a writ of appeal, which is discretionary and rarely granted. The second is to defend the lawsuit. If the defendant wins, the anti-

> SLAPP law is useless and has failed to protect the defendant's constitutional rights.

Cal. Sen. Judiciary Comm. Rep. on AB 1675, at 4.[7]

If the defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression. Thus, a defendant's rights under the anti-SLAPP statute are in the nature of immunity: They protect the defendant from the burdens of trial, not merely from ultimate judgments of liability

Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well. *See generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). A district court's denial of a claim of immunity, to the extent that it turns on an issue of law, is an appealable final decision within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-27, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *see also Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1111 (9th Cir. 2002) (applying the collateral order doctrine to an appeal from an order denying protection under federal statute of repose, on the ground that "an essential aspect of the . . . statute of repose is the right to be free from the burdens of

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[7] This report may be found on the internet at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1651-1700/ab_1675_cfa_ 19990701_075825_sen_comm.html.

trial"). We therefore have jurisdiction to review the district court's denial of Cremers' anti-SLAPP motion.

C. *Probability of Success*

To resist a motion to strike pursuant to California's anti-SLAPP law, Batzel must demonstrate a probability that she will prevail on the merits of her complaint. Cal. Civ. Proc. Code § 425.16. The district court held that Batzel had made such a showing, and absent 47 U.S.C. § 230,[8] we would be inclined to agree.

Section 230(c)(1) specifies that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The provision thereby set limitations on liability under state law for postings on the Internet and other computer networks. The district court declined to extend the legislative grant of immunity pursuant to § 230(c) to Cremers and the Network, holding that the Network is not "an internet service provider" and therefore is not covered by the statute. We do not agree with the district court's reading of § 230.

1. *Section 230(c)*

We begin with a brief survey of the background of § 230(c), as that background is useful in construing the statutory terms here at issue.

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[8] All further references are to 47 U.S.C. unless otherwise noted.

Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, is known as the "Communications Decency Act of 1996" [the "CDA" or "the Act"]. The primary goal of the Act was to control the exposure of minors to indecent material. *See* Pub. L. No. 104-104, Title V (1996); *see also* H.R. Rep. No. 104-458, at 81-91 (1996); S. Rep. No. 104-230, at 187-193 (1996); S. Rep. No. 104-23, at 9 (1995). Parts of the Act have since been struck down as unconstitutional limitations on free speech, *see Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997); *United States v. Playboy Ent. Group*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), but the section at issue here, § 230, remains intact.

Section 230 was first offered as an amendment by Representatives Christopher Cox (R-Cal.) and Ron Wyden (D-Ore.). *See* 141 Cong. Rec. H4860 (August 4, 1995). The specific provision at issue here, § 230(c)(1), overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law. As a matter of policy, "Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others." *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998). Absent § 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement. *See, e.g., Stratton Oakmont, Inc. v. Prodigy Services* Co., 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. May 24, 1995) (pre-Communications Decency Act case holding internet service provider liable for posting by third party on one of its electronic bulletin

boards).[9] Congress, however, has chosen to treat cyberspace differently.[10]

Congress made this legislative choice for two primary reasons. First, Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet,

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[9] A bulletin board, in the Internet context, is "a computer-based system giving users access from remote terminals to text and programs contributed by one another and stored centrally." Oxford English Dictionary 642 (2d Ed. 1989). Bulletin boards allow users to post messages on the Internet and for others to view them, much like a bulletin board in the off-line world.

[10] We note that some commentators have suggested that Congress intended for § 230(c) to override only publisher, not distributor, liability. *See, e.g.*, Ballon § 42.05[3][B]; Susan Friewald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 Harv. J.L. & Tech 569, 637-42 (2001) (courts should leave distributor liability intact when applying § 230); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147, 167-72 (1997) ("[W]hen Congress said 'publisher,' it meant 'publisher,' and not 'distributor'."). Batzel's complaint refers to Cremers as the "publisher" of Smith's e-mail, and she has not argued that Cremers should be treated as a distributor, perhaps because the standard for distributor liability is generally less favorable for plaintiffs. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). We therefore need not decide whether § 230(c)(1) encompasses both publishers and distributors. We do note that, so far, every court to reach the issue has decided that Congress intended to immunize both distributors and publishers. *See Zeran*, 129 F.3d at 331-34; *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1013-17 (Fla. 2001).

and to promote the development of e-commerce. Section 230(a), "Findings," highlights that:

> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

§ 230(a). Similarly, the listed policy objectives of the section include:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

§ 230(b).

Consistent with these provisions, courts construing § 230 have recognized as critical in applying the statute the concern that lawsuits could threaten the "freedom of speech in the new and burgeoning Internet medium." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). "Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government

interference in the medium to a minimum." *Id.*; *see also Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980, 985n.3. Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.

The second reason for enacting § 230(c) was to encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material, so as to aid parents in limiting their children's access to such material. *See* § 230(b)(4); *see also* 141 Cong. Rec. H8469-70 (Statements of Representatives Cox, Wyden, and Barton); *Zeran*, 129 F.3d at 331; *Blumenthal*, 992 F. Supp. at 52. We recognize that there is an apparent tension between Congress's goals of promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet. As a result of this apparent tension, some commentators have suggested that the Fourth Circuit in *Zeran* imposed the First Amendment goals on legislation that was actually adopted for the speech-restrictive purpose of controlling the dissemination of content over the Internet. *See, e.g.*, Ballon § 42.05[3][B][iv]. These critics fail to recognize that laws often have more than one goal in mind, and that it is not uncommon for these purposes to look in opposite directions. The need to balance competing values is a primary impetus for enacting legislation. Tension within statutes is often not a defect but an indication that the legislature was doing its job. *See, e.g.*, *United States v. Kalustian*, 529 F.2d 585, 588 (9th Cir. 1975) (describing dual and some-what competing purposes of the Federal wiretap statute of both protecting individual privacy and combating crime).

So, even though the CDA overall may have had the purpose of restricting content, there is little doubt that the Cox-Wyden amendment, which added what ultimately became § 230 to the Act, sought to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors. *See* 141 Cong. Rec. H8469-72 (Statements of Representatives Cox, Wyden, Lofgren, and Goodlatte).[11] Fostering the two ostensibly competing purposes here works because parents best can control the material accessed by their children with the cooperation and assistance of Inter-net service providers ("ISPs") and other providers and users of services on the Internet.[12] Section 230(b)(4) describes this goal: "It is the policy of the United States . . .

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[11] We also note that at least some members of Congress suspected that much, if not most, of the Act would be struck down as unconstitutional. *See* 141 Cong. Rec. H8470 (the Cox-Wyden amendment sought to provide aid during the "flood of legal challenges" likely to prevent the rest of the Act from having any effect); *see also* Lawrence Lessig, Code and Other Laws of Cyberspace 174 (1999) (referring to the Act as "[a] law of extraordinary stupidity [that] practically impaled itself on the First Amendment."). That position turned out to be prescient. *See Reno*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874; *Playboy Ent. Group*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865. Quite possibly in anticipation that other aspects of the Act would not survive, the Cox-Wyden amendment attempted to control content distributed to minors in a manner consistent with the First Amendment, by encouraging Internet companies to police the Internet for themselves or to assist parents in doing so. *See* 141 Cong. Rec. H8469-72.

[12] An ISP provides its subscribers with access to the Internet. Such service providers include, for example, America Online, commonly referred to as "AOL," and Earthlink, as well as numerous other providers.

to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." § 230(b)(4). Some blocking and filtering programs depend on the cooperation of website operators and access providers who label material that appears on their services.[13] Without the immunity provided in Section 230(c), users and providers of interactive computer services who review material could be found liable for the statements of third parties, yet providers and users that disavow any responsibility would be free from liability. *Compare Stratton Oakmont*, 1997 N.Y. Misc. LEXIS 229, 1995 WL 323710 (holding a service provider liable for speech appearing on its service because it generally reviewed posted content) with *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding a service provider not liable for posted speech because the provider was simply the conduit through which defamatory statements were distributed).

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[13] The vast amount of material on the Internet makes it difficult for an independent board to rate all of the material, as the Motion Picture Association of America can do for the much smaller number of movies distributed. Some filtering systems therefore rely on self-labeling. *See* R. Polk Wagner, *Filters and The First Amendment*, 83 Minn. L. Rev. 755, 760-65 (1999). Zoning, another approach to controlling content on the Internet by creating child-free zones accessible only with digital identification certificates and age verification, also works best with the cooperation of website operators and service providers. *See* Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 Jurimetrics J. 629 (1998); *see also Reno*, 521 U.S. at 886-97 (O'Connor, J., concurring in part and dissenting in part) (describing zoning approach to protecting minors from harmful Internet content).

In particular, Congress adopted § 230(c) to overrule the decision of a New York state court in *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710. *Stratton Oakmont* held that Prodigy, an Internet access provider that ran a number of bulletin boards, could be held responsible for libelous statements posted on its "Money Talk" bulletin board by an unidentified person. *Id.* The court relied on the fact that Prodigy held itself out as a service that monitored its bulletin boards for offensive content and removed such content. 1995 N.Y. Misc. LEXIS 229, [*Id.*] at *2, *4. Prodigy used filtering software and assigned board leaders to monitor the postings on each bulletin board. 1995 N.Y. Misc. LEXIS 229, [*Id.*] at *1-*2. Because of Prodigy's active role in monitoring its bulletin boards, the court found, Prodigy was a publisher for purposes of state libel law and therefore could be held liable for any defamatory statements posted on the website. 1995 N.Y. Misc. LEXIS 229, [*Id.*] at *4.

Although *Stratton* was a defamation case, Congress was concerned with the impact such a holding would have on the control of material inappropriate for minors. If efforts to review and omit third-party defamatory, obscene or inappropriate material make a computer service provider or user liable for posted speech, then website operators and Internet service providers are likely to abandon efforts to eliminate such material from their site. *See* S. Rep. No. 104-230, at 194 (1996) ("One of the specific purposes of [Section 230] is to overrule *Stratton-Oakmont* v. *Prodigy* and any other similar decisions . . . ."); H.R. Conf. Rep. No. 104-458, at 194 (1996) ("The conferees believe that [decisions such as *Stratton Oakmont*] create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."); 141 Cong. Rec. at H84691-70 (statement of Rep. Cox) (referring to disincentives created by

Stratton Oakmont decision); *see also Zeran*, 129 F.3d at 331 (emphasizing that § 230 was adopted to overrule *Stratton Oakmont*, and to provide incentives to self-regulate the dissemination of offensive material); Harvey L. Zuckman et al., Modern Communication Law 615 (1999) (observing that it is "crystal clear that [Section 230 was] designed to change the result in future cases like *Stratton Oakmont*").[14]

2. *Application to Cremers and the Museum Security Network*

To benefit from § 230(c) immunity, Cremers must first demonstrate that his Network website and listserv qualify as "provider[s] or user[s] of an *interactive computer service*." § 230(c)(1) (emphasis added). An "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." § 230(f)(2).

The district court concluded that only services that provide access to the Internet as a whole are covered by this

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[14] Although not relevant to the current case, § 230(c)(2) further encourages good samaritans by protecting service providers and users from liability for claims arising out of the removal of potentially "objectionable" material from their services. *See* § 230(c)(2). This provision insulates service providers from claims premised on the taking down of a customer's posting such as breach of contract or unfair business practices. *Cf.* 17 U.S.C. § 512(g)(1) (providing similar protection for service providers who take down material alleged to violate copyright laws); H. R. Rep. No. 105-551, at 25 (1998).

definition. But the definition of "interactive computer service" on its face covers "*any*" information services or other systems, as long as the service or system allows "multiple users" to access "a computer server." Further, the statute repeatedly refers to "the Internet and *other* interactive computer services," (emphasis added), making clear that the statutory immunity extends beyond the Internet itself. §§ 230(a)(3), (a)(4), (b)(1), (b)(2), and (f)(3). Also, the definition of "interactive computer service" after the broad definition language, states that the definition "*includ[es]* specifically a service or system that provides access to the Internet," § 230(f)(2) (emphasis added), thereby confirming that services providing access to the Internet as a whole are only a subset of the services to which the statutory immunity applies.[15]

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[15] Other courts construing § 230(f)(2) have recognized that the definition includes a wide range of cyberspace services, not only internet service providers. *See, e.g., Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831, 121 Cal. Rptr. 2d 703 & n.7 (2002) (on-line auction website is an "interactive computer service"); *Schneider v. Amazon.com*, 108 Wn. App. 454, 31 P.3d 37, 40-41 (Wash Ct. App. 2001) (on-line bookstore Amazon.com is an "interactive computer service"); *Barrett v. Clark*, 2001 WL 881259 at *9 (Cal. Sup. Ct. 2001) (newsgroup considered an "interactive computer service"); *see also Ben Ezra*, 206 F.3d at 985 (parties conceded that AOL was an interactive computer service when it published an on-line stock quotation service); *Zeran*, 129 F.3d at 330 (AOL assumed to be interactive computer service when it operated bulletin board service for subscribers); *Blumenthal*, 992 F. Supp. at 49-50 (parties conceded that AOL was an "interactive computer service" even when it functioned as the publisher of an on-line gossip column).

There is, however, no need here to decide whether a listserv or website itself fits the broad statutory definition of "interactive computer service," because the language of § 230(c)(1) confers immunity not just on "providers" of such services, but also on "users" of such services.[16] § 230(c)(1). There is no dispute that the Network uses interactive computer services to distribute its on-line mailing and to post the listserv on its website. Indeed, to make its website available and to mail out the listserv, the Network *must* access the Inter-net through some form of "interactive computer service." Thus, both the Network website and the listserv are potentially immune under § 230.

Critically, however, § 230 limits immunity to information "provided by another information content provider." § 230(c)(1). An "information content provider" is defined by the statute to mean "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(3). The reference to "*another* information content provider" (emphasis added) distinguishes the circumstance in which the interactive computer service itself meets the definition of "information content provider" with respect to the information in question. The pertinent question therefore becomes whether Smith was the sole content provider of his e-mail, or whether Cremers

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[16] We note that several courts to reach the issue have decided that a website is an "interactive computer service." *See, e.g., Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1065-66 (C.D. Cal. 2002); *Gentry*, 99 Cal. App. 4th at 831 (holding that website is an interactive computer service); *Schneider*, 31 P.3d at 40-41 (same).

can also be considered to have "creat[ed]" or "develop[ed]" Smith's e-mail message forwarded to the listserv.[17]

Obviously, Cremers did not create Smith's e-mail. Smith composed the e-mail entirely on his own. Nor do Cremers's minor alterations of Smith's e-mail prior to its posting or his choice to publish the e-mail (while rejecting other e-mails for inclusion in the listserv) rise to the level of "development." As we have seen, a central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted. Also, the exclusion of "publisher" liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.

The "development of information" therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication.[18] Because

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[17] We do not separately analyze Cremers's statement regarding contacting the FBI. Batzel has presented no evidence that the statement was untrue. No action for defamation can go forward absent such evidence. *See Cort v. St. Paul Fire and Marine Ins. Companies, Inc.*, 311 F.3d 979, 985 (9th Cir. 2002) ("An essential element of defamation is that the publication in question must contain a false statement of fact.") (quoting *Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434, 444, 26 Cal. Rptr. 2d 305 (1993)).

[18] Other courts have agreed that the "exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, post-pone or alter content" do not transform an individual into a "content provider" within the meaning of § 230. Zeran, 129 F.3d at 330; *see also Ben Ezra*, 206 F.3d at 985-86

Cremers did no more than select and make minor alterations to Smith's e-mail, Cremers cannot be considered the content provider of Smith's e-mail for purposes of § 230.[19]

(defendant not "information content provider" although it edited and altered stock quotations provided by third party); *Blumenthal*, 992 F. Supp. at 49-53 (defendant not "information content provider" although it had editorial control over content in gossip column); *Schneider*, 31 P.3d at 39-43 (website not "information content provider" although it had strict posting guidelines and could edit and republish posted material).

[19] As other courts have pointed out, the broad immunity created by § 230 can sometimes lead to troubling results. *See, e.g.*, *Blumenthal*, 992 F. Supp. at 51-52 (expressing opinion that "[i]f it were writing on a clean slate," AOL would be liable for defamation when it had editorial control over the defamatory material). For example, a service provider that cannot be held liable for posting a defamatory message may have little incentive to take such material down even if informed that the material is defamatory.

One possible solution to this statutorily created problem is the approach taken by Congress in the Digital Millennium Copyright Act ("Digital Act"). The Digital Act includes immunity provisions, similar to those of the Communications Decency Act, that protect service providers from liability for content provided by third parties. The Digital Act, however, unlike the Communications Decency Act, provides specific notice, take-down, and put-back procedures that carefully balance the First Amendment rights of users with the rights of a potentially injured copyright holder. *See* 17 U.S.C. §§ 512(c) and (g); *see also* H.R. Rep. No. 105-551, at 52-62 (1998) (describing the DMCA's take-down and put-back procedures); Comm. Print, Section-By-Section Analysis of H.R. 2281, at 25-36 (Sept. 1998) (same). To date, Congress has not amended § 230 to provide for similar take-down and put-back procedures.

The partial dissent does not register any disagreement with this interpretation of the definition of "information content provider" or with the observation that immunity for "publisher[s]" indicates a recognition that the immunity will extend to the selection of material supplied by others. It nonetheless simultaneously maintains that 1) a defendant who takes an active role in selecting information for publication is not immune; and 2) interactive computer service users and providers who screen the material submitted and remove offensive content are immune. *See* post at 8465 and n. 5. These two positions simply cannot logically coexist.

Such a distinction between deciding to publish only some of the material submitted and deciding *not* to publish some of the material submitted is not a viable one. The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.

A distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either. For one thing, there is no basis for believing that Congress intended a one-bite-at-the-apple form of immunity. Also, Congress could not have meant to favor removal of offending material over more advanced software that screens out the material before it ever appears. If anything, the goal of encouraging assistance to parents seeking to control children's access to offensive material would suggest a preference for a system in which the offensive material is not available even temporarily. The upshot is that the partial dissent's posit concerning the limitations of § 230(c) immunity simply cannot be squared with the statute's language and purposes, whatever merit it, or a variant of it, might have as a policy matter. *See* n. 19, *supra*.

In most cases our conclusion that Cremers cannot be considered a content provider would end matters, but this case presents one twist on the usual § 230 analysis: Smith maintains that he never "imagined [his] message would be posted on an international message board or [he] never would have sent it in the first place." The question thus becomes whether Smith can be said to have "provided" his e-mail in the sense intended by § 230(c). If the defamatory information is not "*provided* by another information content provider," then § 230(c) does not confer immunity on the publisher of the information.

"[P]rovided" suggests, at least, some active role by the "provider" in supplying the material to a "provider or user of an interactive computer service." One would not say, for example, that the author of a magazine article "provided" it to an interactive computer service provider or user by allowing the article to be published in hard copy off-line. Although such an article is available to anyone with access to a library or a newsstand, it is not "provided" for use on the Internet.

The result in the foregoing example should not change if the interactive computer service provider or user has a subscription to the magazine. In that instance, the material in question is "provided" to the "provider or user of an interactive computer service," but not in its role as a provider or user of a computer service. The structure and purpose of § 230(c)(1) indicate that the immunity applies only with regard to third-party information provided *for use on the Internet* or another interactive computer service. As we have seen, the section is concerned with providing special immunity for individuals who would otherwise be publishers or speakers, because of Congress's concern with assuring a free market in ideas and information on the Internet. If

information is provided to those individuals in a capacity unrelated to their function as a provider or user of interactive computer services, then there is no reason to protect them with the special statutory immunity.

So, if, for example, an individual who happens to operate a website receives a defamatory "snail mail" letter from an old friend, the website operator cannot be said to have been "provided" the information in his capacity as a website service.[20] Section 230(c)(1) supplies immunity for only individuals or entities acting as "provider[s]" or "user[s]" of an "interactive computer service," and therefore does not apply when it is not "provided" to such persons in their roles as providers or users.

The situation here is somewhat more complicated than our letter example, because Smith did provide his e-mail over the Internet and transmitted it to the Network, an operator of a website that is an user of an interactive computer service. Nevertheless, Smith contends that he did not intend his e-mail to be placed on an interactive computer service for public viewing.

Smith's confusion, even if legitimate, does not matter, Cremers maintains, because the § 230(c)(1) immunity should

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[20] We note that the partial dissent's interpretation of § 230(c)(1) has a related defect. Under the partial dissent's theory, for example, content that is sent to an interactive service provider or user labeled "for consideration for inclusion on your website" would not be "information provided by another," if the website operator makes selection decisions amongst the material submitted. Yet, almost any speaker of the English language would agree that the content *was* "provided" to the website by the third party.

be available simply because Smith was the author of the e-mail, without more.

We disagree. Under Cremers's broad interpretation of § 230(c), users and providers of interactive computer services could with impunity intentionally post material they knew was never meant to be put on the Internet. At the same time, the creator or developer of the information presumably could not be held liable for unforeseeable publication of his material to huge numbers of people with whom he had no intention to communicate. The result would be nearly limitless immunity for speech never meant to be broadcast over the Internet.

Supplying a "provider or user of an interactive computer service" with immunity in such circumstances is not consistent with Congress's expressly stated purposes in adopting § 230. Free speech and the development of the Internet are not "promote[d]" by affording immunity when providers and users of "interactive computer service[s]" knew or had reason to know that the information provided was not intended for publication on the Internet. Quite the contrary: Users of the Internet are likely to be discouraged from sending e-mails for fear that their e-mails may be published on the web without their permission.

Such a scenario is very different from the bulletin boards that Congress had in mind when passing § 230. When a user sends a message to a bulletin board, it is obvious that by doing so, he or she will be publicly posting the message. Here, by contrast, Smith claims that he had no idea that the Network even had a listserv. His expectation, he says, was that he was simply sending a private e-mail to an organization informing it of his concern about Batzel's artwork, and, he insists, he would not have sent the message had he known it would be sent on through the listserv. Absent an incentive for

service providers and users to evaluate whether the content they receive is meant to be posted, speech over the Internet will be chilled rather than encouraged. Immunizing providers and users of "interactive computer service[s]" for publishing material when they have reason to know that the material is not intended for publication therefore contravenes the Congressional purpose of encouraging the "development of the Internet."

Immunizing individuals and entities in such situations also interferes with Congress's objective of providing incentives for providers and users of interactive computer services to remove offensive material, especially obscene and defamatory speech. Far from encouraging such actions, immunizing a publisher or distributor for including content not intended for Internet publication increases the likelihood that obscene and defamatory material will be widely available. Not only will online publishers be able to distribute such material obtained from "hard copy" sources with impunity, but, because the content provider him or herself never intended publication, there is a greater likelihood that the distributed material will in fact be defamatory or obscene. A person is much more likely to exercise care in choosing his words when he knows that those words will be widely read. This is true not only for altruistic reasons but also because liability for defamation attaches only upon publication. In the current case, Smith claimed exactly that: He told Cremers that if he had known his e-mail would be posted, he never would have sent it. The congressional objectives in passing § 230 therefore are not furthered by providing immunity in instances where posted material was clearly not meant for publication.

At the same time, Congress's purpose in enacting § 230(c)(1) suggests that we must take great care in determining whether another's information was "provided" to

a "provider or user of an interactive computer service" for publication. Otherwise, posting of information on the Internet and other interactive computer services would be chilled, as the service provider or user could not tell whether posting was contemplated. To preclude this possibility, the focus should be not on the information provider's intentions or knowledge when transmitting content but, instead, on the service provider's or user's reasonable perception of those intentions or knowledge. We therefore hold that a service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other "interactive computer service."

It is not entirely clear from the record whether Smith "provided" the e-mail for publication on the Internet under this standard. There are facts that could have led Cremers reasonably to conclude that Smith sent him the information because he operated an Internet service. On the other hand, Smith was not a subscriber to the listserv and apparently sent the information to a different e-mail account from the one at which Cremers usually received information for publication. More development of the record may be necessary to determine whether, under all the circumstances, a reasonable person in Cremers' position would conclude that the information was sent for internet publication, or whether a triable issue of fact is presented on that issue.

We therefore vacate the district court's order denying Cremers's anti-SLAPP motion and remand to the district court for further proceedings to develop the facts under this newly announced standard and to evaluate what Cremers

should have reasonably concluded at the time he received Smith's e-mail. If Cremers should have reasonably concluded, for example, that because Smith's e-mail arrived via a different e-mail address it was not provided to him for possible posting on the listserv, then Cremers cannot take advantage of the § 230(c) immunities. Under that circumstance, the posted information was not "provided" by another "information content provider" within the meaning of § 230. After making such an inquiry, the district court must then evaluate whether Batzel adequately has demonstrated a probability that she will prevail on the merits of her complaint under California's anti-SLAPP statute.[21]

IV

Batzel argues that the district court erred in granting Mosler's motion for summary judgment. According to Batzel, Cremers was acting as Mosler's agent and therefore should be held vicariously liable for Cremers's alleged defamation. We reject this contention.[22]

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and

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[21] Cremers asks us also to evaluate Batzel's invasion of privacy and emotional distress claims. The district court, however, did not address either of these claims. They therefore are not properly before us on this interlocutory appeal.

[22] We review a grant of summary judgment de novo and consider the facts in the light most favorable to Batzel. *See Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002) (citing *Clicks Billiards, Inc. v. Six Shooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)).

subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01(Tentative Draft) ; *DeSuza v. Andersack*, 63 Cal. App. 3d 694, 699, 133 Cal. Rptr. 920 (1976). In order for Mosler to be held vicariously liable for the torts of Cremers on a theory of agency, Mosler must have had the ability to control Cremers's activities. *See, e.g., McCollum v. Friendly Hills Travel Ctr.*, 172 Cal. App. 3d 83, 91, 217 Cal. Rptr. 919 (1985).

Batzel failed to present any genuine issue of material fact as to whether Mosler had control over Cremers's management of the Network. The sponsorship agreement executed by Mosler and Cremers requires, in essence, that Cremers include Mosler's trademark in future editions of the Network. It does not give Mosler any right to control what is published by Cremers. The agreement states that Cremers will "maintain ownership and control of all aspects of [the Network's] content and operation." The agreement further states that Mosler "understands that the Museum Security Network is editorially independent and maintains full control of All [sic] editorial content." Cremers also posted on the Network's website a statement that Mosler "understand[s] that the [Network] must remain editorially independent and they respect that." Rather than evincing Cremers's assent to control by Mosler, these statements disclaim control. Without the element of control, Batzel's vicarious liability argument fails. *See DeSuza*, 63 Cal. App. 3d at 699 (citations omitted) ("The right of the alleged principal to control the behavior of the alleged agent is an essential element which must be factually present in order to establish the existence of agency . . . .").

The fact that Mosler provided Cremers with financial support does not support an inference that Mosler possessed

practical control of Cremers's editorial content. Sponsorship alone is insufficient to render the sponsor the guarantor of the truth of all statements made in a publication. *See Matson v. Dvorak*, 40 Cal. App. 4th 539, 549, 46 Cal. Rptr. 2d 880 (1995) (holding that a party whose "only contribution to a political campaign is financial, and who is not involved in the preparation, review or publication of campaign literature, cannot be subjected to liability in a defamation action for statements contained in that literature").

We likewise reject the argument that Mosler's continued sponsorship of the Network after Cremers published Smith's statements should give rise to liability. Although a principal is liable when it ratifies an originally unauthorized tort,[23] the principal-agent relationship is still a requisite, and ratification can have no meaning without it. Because Cremers was not acting as Mosler's agent at the time he published Smith's statements, Mosler's continued funding of the Network did not amount to ratification of the tort.

The district court accordingly did not err in ruling that Mosler cannot be held vicariously liable for Cremers' actions because there was no principal-agent relationship between Mosler and Cremers. We affirm the district court's grant of summary judgment in favor of Mosler.

Costs on appeal are awarded to Mosler. All other parties are to bear their own costs.

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[23] *See, e.g., Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 852, 77 Cal. Rptr. 2d 12 (1998); *Coats v. Construction & Gen. Laborers Local No. 185*, 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639 (1971); *McChristian v. Popkin*, 75 Cal. App. 2d 249, 256, 171 P.2d 85 (1946).

VACATED IN PART, AFFIRMED IN PART, AND REMANDED

Gould, J., concurring in part, dissenting in part:

I respectfully dissent from the majority's analysis of the statutory immunity from libel suits created by § 230 of the Communications Decency Act (CDA).[1] The majority gives the phrase "information provided by another" an incorrect and unworkable meaning that extends CDA immunity far beyond what Congress intended. Under the majority's interpretation of § 230, many persons who intentionally spread vicious falsehoods on the Internet will be immune from suit. This sweeping preemption of valid state libel laws is not necessary to promote Internet use and is not what Congress had in mind.

Congress in 1996 was worried that excessive state-law libel lawsuits would threaten the growth of the Internet. Congress enacted the CDA, which immunizes "provider[s] or user[s]" of "interactive computer service[s]" from civil liability for material disseminated by them but "provided by another information content provider." 47 U.S.C. § 230(c). Under the CDA, courts must treat providers or users of interactive computer services differently from other information providers, such as newspapers, magazines, or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. Congress believed this special treatment would "promote the continued development of the

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[1] I join the majority opinion's analysis of our jurisdiction and the opinion's affirmance of the district court's grant of summary judgment to Mosler. I dissent only from Part III.C of the opinion.

Internet and other interactive computer services" and "preserve the vibrant and competitive free market" for such services, largely "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1)-(2).

The statute states:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Three elements are thus required for § 230 immunity: (1) the defendant must be a provider or user of an "interactive computer service"; (2) the asserted claims must treat the defendant as a publisher or speaker of information; and (3) the challenged communication must be "information provided by another information content provider."[2] The majority and I agree on the importance of the CDA and on the proper interpretation of the first and second elements. We disagree only over the third element.[3]

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[2] An "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(e)(3).

[3] This case may be the first to pose the question of whether CDA immunity extends to a user or provider of an Internet newsletter or "listserv." CDA immunity should not depend, however, on rigid characterizations of particular services. As the amicus explains, there are many different kinds of listservs, each relying on different technology. There also are many kinds of Internet "bulletin boards," "chat rooms," "moderated listservs," "unmoderated listservs," and "e-mail newsletters." Because the

The majority holds that information is "provided by another" when "a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other 'interactive computer service.'" *Supra* at 8456. In other words, whether information is "provided" depends on the *defendant's perception* of the *author's intention*. Nothing in the statutory language suggests that "provided" should be interpreted in this convoluted and unworkable fashion.

Under the majority's rule, a court determining whether to extend CDA immunity to a defendant must determine whether the author of allegedly defamatory information – a person who often will be beyond reach of the court's process or, worse, unknown – intended that the information be distributed on the Internet. In many cases, the author's intention may not be discernable from the face of the defamatory communication. Even people who want an e-mail message widely disseminated may not preface the message with words such as "Please pass it on." Moreover, the fact-intensive question of the author's intent is particularly unsuited for a judge's determination before trial, when the immunity question will most often arise.

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contours of these categories are not clear, an approach that determined CDA immunity based on a technology's classification into one of these categories might cause considerable mischief. Rather than categorical rules, what is needed is an inquiry tailored to each case. CDA immunity should depend not on how a defendant's technology is classified, but on the defendant's conduct.

The majority's rule will be incomprehensible to most citizens, who will be unable to plan their own conduct mindful of the law's requirements. Laypersons may not grasp that their tort liability depends on whether they reasonably should have known that the author of a particular communication intended that it be distributed on the Internet. Laypersons certainly will not grasp *why* this should be the case, as a matter of justice, morality, or politics. Those who receive a potentially libelous e-mail message from another person would seldom wonder, when deciding whether to forward the message to others, "Did *the author* of this defamatory information intend that it be distributed on the Internet?"[4] However, those who receive a potentially libelous e-mail almost certainly would wonder, "Is it appropriate *for me* to spread this defamatory message?" By shifting its inquiry away from the defendant's conduct, the majority has crafted a rule that encourages the casual spread of harmful lies. The majority has improvidently crafted a rule that is foreign to the statutory text and foreign to human experience.

The majority rule licenses professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity. So long as the defamatory information was written by a person who wanted the information to be spread on the Internet (in other words, a person with an axe to grind), the rumormonger's injurious conduct is beyond legal redress. Nothing in the CDA's text or legislative history suggests that Congress intended CDA immunity to extend so far. Nothing in the text, legislative history, or human experience would lead me to accept the notion that Congress

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[4] The subjective intent of the initial author, even if knowable, would say little about the propriety of disseminating a libelous communication.

in § 230 intended to immunize users or providers of interactive computer services who, by their discretionary decisions to spread particular communications, cause trickles of defamation to swell into rivers of harm.

The problems caused by the majority's rule all would vanish if we focused our inquiry not on the *author's intent*, but on the *defendant's acts*, as I believe Congress intended. We should hold that the CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication. If the defendant took an active role in selecting information for publication, the information is no longer "information provided by another" within the meaning of § 230. We should draw this conclusion from the statute's text and purposes.

A person's decision to select particular information for distribution on the Internet changes that information in a subtle but important way: it adds the person's imprimatur to it. The recipient of information that has been selected by another person for distribution understands that the information has been deemed worthy of dissemination by the sender. Information that bears such an implicit endorsement[5] is no longer merely the "information provided by" the original sender. 47 U.S.C. § 230(c)(1). It is information transformed. It is information bolstered, strengthened to do more harm if it is wrongful. A defendant who has actively selected libelous information for distribution thus should not

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[5] By "endorsement," I do not mean that the person who selects information for distribution agrees with the content of that information. Rather, I mean that the person has endorsed the information insofar as he or she has deemed it appropriate for distribution to others. That adds enough to the information to remove it from CDA immunity.

be entitled to CDA immunity for disseminating "information provided by another."

My interpretation of § 230 is consistent with the CDA's legislative history. Congress understood that entities that facilitate communication on the Internet – particularly entities that operate e-mail networks, "chat rooms," "bulletin boards," and "listservs" – have special needs. The amount of information communicated through such services is staggering. Millions of communications are sent daily. It would be impossible to screen all such communications for libelous or offensive content. Faced with potential liability for each message republished by their services, interactive computer service users and providers might choose to restrict severely the number and type of messages posted. The threat of tort liability in an area of such prolific speech would have an obvious chilling effect on free speech and would hamper the new medium.

These policy concerns have force when a potential defendant uses or provides technology that enables others to disseminate information directly without intervening human action. These policy concerns lack force when a potential defendant does not offer users this power of direct transmission. If a potential defendant employs a person to screen communications to select some of them for dissemination, it is not impossible (or even difficult) for that person to screen communications for defamatory content. Immunizing that person or the person's employer from liability would not advance Congress's goal of protecting those in need of protection.

If a person is charged with screening all communications to select some for dissemination, that person can decide not to disseminate a potentially offensive communication. Or that

person can undertake some reasonable investigation. Such a process would be relatively inexpensive and would reduce the serious social costs caused by the spread of offensive and defamatory communications.

Under my interpretation of § 230, a company that operates an e-mail network would be immune from libel suits arising out of e-mail messages transmitted automatically across its network. Similarly, the owner, operator, organizer, or moderator of an Internet bulletin board, chat room, or listserv would be immune from libel suits arising out of messages distributed using that technology, provided that the person does not actively select particular messages for publication.

On the other hand, a person who receives a libelous communication and makes the decision to disseminate that messages to others – whether via e-mail, a bulletin board, a chat room, or a listserv – would not be immune.

My approach also would further Congress's goal of encouraging "self-policing" on the Internet. Congress decided to immunize from liability those who publish material on the Internet, so long as they do not actively select defamatory or offensive material for distribution. As a result, those who *remove* all or part of an offensive information posted on (for example) an Internet bulletin board are immune from suit.[6]

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[6] As long as an interactive computer service permits users to post messages directly in the first instance, the messages are "information provided by another," and the user or provider is entitled to CDA immunity, even if the provider later removes all or part of the offensive communication. An important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. *Zeran*, 129

Those who employ blocking or filtering technologies that allow readers to avoid obscene or offensive materials also are immune from suit.

On the other hand, Congress decided not to immunize those who actively select defamatory or offensive information for distribution on the Internet. Congress thereby ensured that users and providers of interactive computer services would have an incentive not to spread harmful gossip and lies intentionally.

Congress wanted to ensure that excessive government regulation did not slow America's expansion into the exciting new frontier of the Internet. But Congress did not want this new frontier to be like the Old West: a lawless zone governed by retribution and mob justice. The CDA does not license anarchy. A person's decision to disseminate the rankest rumor or most blatant falsehood should not escape legal redress merely because the person chose to disseminate it through the Internet rather than through some other medium. A proper analysis of § 230, which makes a human being's decision to disseminate a particular communication the touchstone of CDA immunity, reconciles Congress's intent to deregulate the Internet with Congress's recognition that certain beneficial technologies, which promote efficient global communication and advance values enshrined in our First Amendment, are unique to the Internet and need special protection. Congress wanted to preserve the Internet and aid its growth, but not at all costs. Congress did not want to remove incentives for

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F.3d at 331. Preserving CDA immunity, even when a service user or provider retains the power to delete offensive communications, ensures that such entities are not punished for regulating themselves.

people armed with the power of the Internet to act with reasonable care to avoid unnecessary harm to others.

In this case, I would hold that Cremers is *not* entitled to CDA immunity because Cremers actively selected Smith's e-mail message for publication. Whether Cremers's Museum Security Network is characterized as a "moderated listserv," an "e-mail newsletter," or otherwise, it is certain that the Network did not permit users to disseminate information to other users directly without intervening human action. According to Cremers, "To post a response or to provide new information, the subscriber merely replies to the listserv mailing and *the message is sent directly to Cremers, who includes it* in the listserv with the subsequent distribution." (emphasis added).

This procedure was followed with respect to Smith's e-mail message accusing Batzel of owning art stolen by a Nazi ancestor. Smith transmitted the message to one e-mail account, from which Cremers received it. Cremers forwarded the message to a second e-mail account. He pasted the message into a new edition of the Museum Security Network newsletter. He then sent that newsletter to his subscribers and posted it on the Network's website. Cremers's decision to select Smith's e-mail message for publication effectively altered the messages's meaning, adding to the message the unstated suggestion that Cremers deemed the message worthy of readers' attention. Cremers therefore did not merely distribute "information provided by another," and he is not entitled to CDA immunity.

From the record before us, we have no reason to think that Cremers is not well-meaning or that his concerns about stolen artwork are not genuine. Nor on this appeal do we decide whether his communications were defamatory or

harmful in fact. We deal only with immunity. And, in my view, there is no immunity under the CDA if Cremers made a discretionary decision to distribute on the Internet defamatory information about another person, without any investigation whatsoever. If Cremers made a mistake, we should not hold that he may escape all accountability just because he made that mistake on the Internet.

I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 01-56380, 01-56556

[Filed June 24, 2003]

ELLEN L. BATZEL, a citizen of the State of California,
Plaintiff-Appellee,

v.

ROBERT SMITH, a citizen of the State of North Carolina; NETHERLANDS MUSEUMS ASSOCIATION, an entity of unknown form;MOSLER, INC., a Delaware corporation with its principal place of business in Ohio
Defendants,

and

TON CREMERS, citizen subject of the Netherlands
Defendant-Appellant.

ELLEN L. BATZEL, a citizen of the State of California,
Plaintiff-Appellant,

v.

ROBERT SMITH, a citizen of the State of North Carolina;

NETHERLANDS MUSEUM ASSOCIATION, an entity of unknown form; TON CREMERS, a citizen or subject of the Netherlands; MOSLER, INC., a Delaware corporation with its principal place of business in Ohio.

Defendants-Appellees.

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is VACATED in part, AFFIRMED in part and REMANDED. All parties are to bear their own costs.

Filed and entered: June 24, 2003

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 01-56556

[Filed June 24, 2003]

ELLEN L. BATZEL, a citizen of the State of California
Plaintiff-Appellant,

v.

ROBERT SMITH, a citizen of the State of North Carolina; NETHERLANDS MUSEUMS ASSOCIATION, an entity of unknown form;TON CREMERS, a citizen or subject of the Netherlands;MOSLER, INC., a Delware corporation with its principal place of business in Ohio,
Defendants-Appellees.

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the

said District Court in this cause be, and hereby is VACATED in part, AFFIRMED in part and REMANDED. All parties are to bear their own costs.

Filed and entered: June 24, 2003

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 00-9590 SVW (AJWx)

(Filed July 25, 2001)

ELLEN L. BATZEL, Plaintiff,

v.

ROBERT SMITH, et al., Defendants.

JUDGES: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

ORDER DENYING DEFENDANT'S ANTI-SLAPP MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

Plaintiff Batzel is an attorney with a substantial art and entertainment practice. Batzel hired Defendant Robert Smith to paint and repair her home in North Carolina. Plaintiff

alleges that during the course of this employment relationship Batzel and Smith had a falling out when Batzel refused to give a script written by Smith to her entertainment industry clients.

Smith sent an email to Defendant Cremers and MSN alleging that he believed Plaintiff had stolen Nazi art in her home and that he heard Plaintiff make statements that she was a decedent of Nazi officials.[1] Cremers published the e-mail and related updates under the headings of "Nazi loot" and "stolen art" on five occasions in September 1999 allegedly without investigating the veracity of the information.

Batzel learned of the publication of this information from an anonymous emailer on January 4, 2000. She contacted MSN and Mosler, MSN's corporate sponsor, and requested a retraction. None was published. MSN also did not advise people who inquired that the allegations were false. As a

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[1] Smith's email read:

> I am a building contractor in Asheville, North Carolina, USA. A month ago, I did a remodeling job for a woman, Ellen L. Batzel who bragged to me about being the granddaughter of "one of Hitler's right-hand men." At the time, I was concentrating on performing my tasks, but upon reflection, I believe she said she was the descendant of Henrich Himmler.
>
> Ellen Batzel has hundreds of older European paintings on her walls, all with heavy carved wooden frames. She told me she inherited them.
>
> I believe these paintings were looted during WWII and are the rightful legacy of the Jewish people. . . .

Complaint at 7, lines 22-27, and 8, lines 1-5.

result of the publication of Smith's story, Batzel alleges that she lost several prominent clients and the North Carolina Bar investigated her.

II. Analysis

Defendant Cremers has moved to dismiss this suit under Cal. Civ. Proc. Code § 425.16. This statute requires a Plaintiff to show probability of success on the merits where the activities upon which the suit is based are "in furtherance of [the person's] right of petition or free speech under the United States or California Constitution in connection with a public issue. . ." The Plaintiff can show the probability of success required by this statute if she submits admissible evidence supporting all elements of her prima facie case. See, e.g., *Metabolife Inc v. Wornick*, 72 F. Supp. 2d 1160 (S.D. Cal. 1999); *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994).

As outlined by the Court's June 5, 2001 order requesting further briefing, Plaintiff is a private person but the subject matter of the statements at issue here is a matter of public concern. Accordingly, the elements Plaintiff must show in her prima facie case are: 1) a defamatory statement which injured the Plaintiff; 2) publication; 3) falsity; and 4) negligence as to the veracity of the statement,[2] Cal. Civ. Code § 45; *Gertz v. Welch*, 418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974); *Khawar v. Globe Inc.*, 19 Cal. 4th 254, 265, 965 P.2d 696; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); *In re IBP*

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[2] Plaintiff will have to show a higher standard of culpability on the part of Cremers if she seeks to recover presumed or punitive damages. *Gertz*, 418 U.S. at 350.

Confidential Bus. Documents Litigation, 797 F.2d 632 (8th Cir. 1986); *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 373-74, 54 Cal. Rptr. 2d 781, 786-87 (Ct. App. 1996); *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 742, 257 Cal. Rptr. 708, 771 P.2d 406 (1989).

There is no serious dispute that an allegation that someone bragged about Nazi ancestry and possessed art stolen by Nazis is defamatory. It also had a particular tendency to injure Plaintiff in her occupation because of her client base and art and entertainment industry practice. It was the cause of inquiry by the state bar of North Carolina and prompted her to move from her house in North Carolina. Batzel Decl. It is clear that Cremers published the statement when he put it in his newsletter and on his website. Thus, the locus of the inquiry regarding admissible evidence is the falsity and negligence aspects of the case. *See* Plaintiff's June 19, 2001 Brief at 2-4.

A. Falsity

Plaintiff has submitted her own declaration under penalty of perjury that she has not bragged about being descendent from Nazi officials and has not inherited any art. She has also submitted the deposition of Robert Smith in which he admits that Plaintiff did not "brag" to him about her ancestry. Batzel Decl. at 22, March 12, 2001 Smith Depo. at 93 line 19 - 95 line 8. Plaintiff's declaration also asserts that she did not inherit any art. Batzel Decl. at 24. This statement is supported by the declaration of an art dealer, Nigel Turner, from whom Batzel bought many paintings. Mr. Turner also declares that in September 1999 Batzel had ten pre-1945 artworks which she bought from him; he had no reason to believe that they were any stolen art. Only one of the ten, he says, has a heavy carved wooden frame. Decl. of Nigel Turner.

Batzel's sister and administrator of her father's estate declares that Batzel's father's estate contained no paintings and that neither of Batzel's parents possessed any art painted prior to 1950. Decl. of Lizabeth DeStefano.

Smith also testified to the following in his deposition: Plaintiff actually did not tell him that she inherited all of her paintings but rather indicated that she had purchased some of them; she did not have hundreds of European paintings with heavy carved wooden frames hanging on her walls; and he did not see any of Plaintiff's paintings hanging on her walls - they were wrapped in bubble wrap in Plaintiff's garage when he saw them. Smith Depo. at 29-30; 101-104.

Thus, Plaintiff has submitted admissible evidence that Smith's statements are false.

B. Negligence

Cremers did not conduct any investigation of Smith's statement or even find out whether or not Smith was a real person prior to publication of the email. He also never followed up on the FBI investigation. Plaintiff's Opposition to Motion, App., Ex 59, 10. Cremers further admitted that he was wrong and not cautious in publishing Smith's email. App., Ex 36 and 19. Thus, Cremers himself seemingly acknowledges negligence.

Failure to investigate is not negligent where the source of the information is reliable and there are other circumstantial indicia of reliability. *Reader's Digest Assn. v. Superior Court of Marin County*, 37 Cal. 3d 244, 259, 208 Cal. Rptr. 137, 690 P.2d 610 (1984). Here however Cremers not only had no basis for determining that Smith was reliable but in fact questioned whether the source was even being truthful about

his identity. The email was sent without any accompanying circumstances to suggest reliability. Plaintiff has produced admissible evidence that Cremers did not conduct any investigation or make any inquiries before publishing Smith's statement and that Smith's statements are false.

Since Plaintiff has produced admissible evidence on all elements of her case, she has satisfied the Cal. Civ. Proc. Code § 425.16 requirement that Batzel demonstrate a probability of success on the merits.

Defendant's Motion to Strike is DENIED.

IT IS SO ORDERED.

DATED: 7/25/2001

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 00-9590 SVW (AJWx)

[Filed June 5, 2001]

ELLEN L. BATZEL,)
Plaintiff,)
)
v.)
)
ROBERT SMITH, et al.,)
Defendants.)
)

JUDGE: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

ORDER DENYING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION; DENYING MOTION TO DISMISS ON FORUM NON-CONVENIENS GROUNDS; ORDERING RE-BRIEFING ON THE PRIMA FACIE DEFAMATION CASE TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendants Museum Security Network ("MSN") and Tom Cremers, the creator and operator of MSN, have moved to dismiss Plaintiff's complaint (1) for lack of personal jurisdiction and (2) on grounds of forum non-conveniens. In

addition, Defendants have moved to strike Plaintiff's complaint under § 425.16 of the California Code of Civil Procedure, the so-called anti-SLAPP statute. For the reasons discussed below, the Court denies Defendants' motion to dismiss for lack of personal jurisdiction and on the basis of forum non-conveniens. However, it reserves ruling on Defendants' motion to strike Plaintiff's complaint under Cal. Civ. Proc. Code § 425.16 until after further briefing, as ordered herein, is completed by the parties.

I. BACKGROUND

MSN is an internet website that publishes newsletters concerning art and museum security issues. It is operated out of the Netherlands. Ton Cremers is the creator and sole operator of MSN. Cremers both receives submissions from others and composes his own content for the MSN newsletter. Individuals can subscribe to the newsletter via the MSN website. Cremers maintains a subscriber list to whom he e-mails newsletters and invitations to view the website.

Defendant Bob Smith painted Plaintiff Ellen Batzel's house in North Carolina. Batzel is an entertainment lawyer with art industry business and a number of Jewish clients in California. According to Plaintiff's complaint, Smith asked Batzel to take a script to her clients to review. When Batzel declined Smith's request, Smith allegedly became angry with Plaintiff.

Thereafter, Smith located the MSN website and sent an e-mail to Cremers. The e-mail indicated that he, Smith, had been working in the home of a lawyer who claimed to be the granddaughter of Heinrich Himler and who bragged about having an art collection stolen from Jewish families by the Nazis. Cremers published the e-mail and related updates on

five occasions in September of 1999, allegedly without investigating the veracity of the information received from Smith. The tenor of subsequent publications of this information suggested that MSN itself had investigated the allegations.

Batzel learned of the publication of this information from an anonymous emailer on January 4, 2000. She contacted MSN and defendant Mosler, Inc., MSN's corporate sponsor, and requested a retraction. None was published. Cremers did not advise people who inquired about the Batzel information that the allegations were false. As a result of the publication of Smith's story, Batzel alleges that she lost several prominent clients in California and also became the subject of an investigation by the North Carolina Bar.

II. PERSONAL JURISDICTION

California law permits the exercise of personal jurisdiction to the full extent permitted by due process. See Cal. Civ. Code § 410.10. Whether the exercise of personal jurisdiction over Defendants MSN and Cremers (hereinafter the "Defendants" or "MSN/Cremers") is proper depends on whether Plaintiff has alleged sufficient "minimum contacts" between MSN/Cremers and the state of California for purposes of general or specific jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In this case, the Court concludes that MSN/Cremers' contacts with California are sufficient for purposes of specific jurisdiction. Therefore, it need not decide whether general jurisdiction also exists.

Specific jurisdiction exists if (1) the nonresident defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of

the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997). For purposes of this jurisdictional analysis, the Court must accept as true the allegations contained in Plaintiffs complaint. *See Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

A. Purposeful Availment

The Defendants' contacts with California evince an intent to purposefully avail themselves of the benefits and privileges of conducting business in California. Although the MSN website is operated from Holland, the connections to California are not merely "random, fortuitous, or attenuated." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). According to Plaintiff's complaint, since July of 1997, Cremers has transmitted his newsletter via the internet to California multiple times per week. In addition, in July of 1999, MSN/Cremers entered into a corporate sponsorship agreement with Mosler, Inc., a museum security company based in Anaheim, California.

Moreover, several California residents, as well as a number of California organizations and museums, were subscribers to Cremers' mailing list during the time the allegedly defamatory email was published. These California subscribers included the following: the Los Angeles County Museum of Art, the Getty Museum, Pacific Bell, the Autry Museum of Western Heritage, the California Academy of Sciences, the Nixon Library, the University of Southern California, the City of San Bernardino, the J.P. Getty Trust,

and the Los Angeles Police Department Art Theft Detail. Significantly, in 1999, Cremers traveled to California to a conference held at the Getty Museum. At this conference he promoted the MSN website, solicited subscribers for the MSN newsletter, and sought corporate sponsorship of the website.

Finally, Cremers has also republished several articles in his newsletters and website from California newspapers, including the Los Angeles Times, the San Francisco Chronicle, and the San Jose Mercury & Northridge Daily. As Plaintiff notes, if Cremers had complied with the copyright laws, he would have had to enter into copyright licensing agreements with those California newspapers.

These various contacts with California demonstrate that the Defendants purposefully availed themselves of numerous opportunities to conduct significant activities in the state. This is not a case where a defendant operated a strictly "passive" website, in which the only contacts with the forum state consisted of mere viewings of the website's content by those surfing the internet. *See, e.g., Cybersell, Inc.*, 130 F.3d at 419; *CFOs 2 Go Inc. v. CFO 2 Go Inc.*, 1998 U.S. Dist. LEXIS 8886, 1998 WL 320821, at *3 (N.D. Cal. 1998); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 299-300 (S.D.N.Y. 1996); *aff'd 126 F.3d 25 (2d Cir. 1997)*. Here, there was more. In fact, this case mirrors *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093 (N.D. Cal. 1999), and *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

In *Nicosia*, the defendant published disparaging statements about the plaintiff on her website. The defendant then sent one hundred e-mails to various individuals inviting them to view her website. Eleven of these e-mails were sent to people in California. The e-mails were sent to individuals who would

be particularly interested in their content. The *Nicosia* court found that such invitation e-mails were akin to sending newspapers to the forum state and constituted the contacts necessary to exercise personal jurisdiction.[1] *See* 72 F. Supp. 2d at 1098-99.

In *Blumenthal*, the defendant published a website gossip column known as the Drudge Report. He had a list of email subscribers to whom he e-mailed new editions of the Drudge Report. He printed disparaging remarks about Plaintiff in this column. Defendant had also traveled to the forum state on a couple of occasions. On one of these visits, he promoted the Drudge Report. He also solicited support from individuals in the forum state and received gossip from those in the forum. The court in *Blumenthal* accordingly found that these contacts with the forum were sufficient to exercise jurisdiction over the defendant. *See* 992 F. Supp. at 56-57.

The similarities between this case and both *Nicosia* and *Blumenthal* are striking. Cremers traveled to California both to promote the MSN website and to solicit money at the Getty Museum in 1999. He re-published the content of several California newspapers. He had numerous California e-mail subscribers, including several prominent California institutions such as the Los Angeles County Museum of Art, Pacific Bell, and the University of Southern California, to whom he regularly sent invitations to view the newsletter. These subscribers specifically had to sign up through the MSN website and consisted of organizations and individuals

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[1] In so holding, the court relied on *Gordy v. Daily News, L.P.*, 95 F.3d 829 (9th Cir. 1996), in which only .0017% of the newspapers - 13 to 18 copies - was distributed in the state of California.

with a unique interest in art. Thus, the Defendants' activities in California clearly rose to the level of purposeful availment.

B. Relation Between Plaintiff's Claim and Defendants' Contacts

To determine whether a claim arises out of forum-related activities, courts apply a "but for" test. *Ziegler v. Indian River County*, 64 F.3d 470, 474 (9th Cir. 1995). Here, there is no doubt that but for the publication of Smith's accusations on MSN - which were read by California organizations and individuals - Plaintiff would not have been injured as she claims in her complaint.

C. Reasonableness Of Exercising Personal Jurisdiction

The bare existence of minimum contacts is not sufficient to allow a court to exercise personal jurisdiction over a defendant. The assertion of jurisdiction must also be reasonable, that is, it must comport with traditional notions of "fair play and substantial justice." *International Shoe*, 326 U.S. at 316. Under the Supreme Court's decision in *Burger King*, 471 U.S. at 476-77, the burden is on the defendant to demonstrate unreasonableness, which requires the defendant to put on a "compelling case." The Defendants have made no such compelling showing here.

When assessing the reasonableness of exerting jurisdiction over a defendant, courts consider a variety of factors: (1) the extent of the defendant's purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum

to the plaintiff's interest in convenient and effective relief, and (7) the existence of an alternative forum. *See id.* Here, the reasonableness analysis tips easily in Plaintiff's favor.

First, given the extent of MSN/Cremers' contacts with California generally, and with the Los Angeles art world in particular, there is no question that Cremers purposefully interjected himself in this state. Second, the burden of litigating in California is eased by the fact that Cremers has secured the able representation of a prestigious Los Angeles law firm. In addition, Cremers' facility in communicating via the internet will surely help reduce some of the travel that might otherwise be required of a defendant residing outside the United States.

With regard to the third *Burger King* factor, the exercise of jurisdiction here would be no affront to Dutch sovereignty. The Defendants allegedly disparaged an American citizen living in the United States and did so largely to American institutions and individuals located in the United States. Moreover, the MSN site is transmitted in the English language, not Dutch. The mere fact that Cremers lives and operates his website in Holland does not, by itself, make exercise of jurisdiction by this Court unreasonable.

Indeed, this Court has a greater interest in resolving the present dispute given that (1) a California resident was injured, (2) a significant delay would certainly result if litigation in Holland were initiated, (3) the Court has already become familiar with the facts of the case, and (4) the Court has already adjudicated several substantial motions in connection with this case. For these same reasons, this Court could achieve the most efficient resolution of Plaintiff's complaint and is best positioned to provide the most effective and convenient relief.

Finally, the Defendants have tendered no evidence indicating the existence of a viable, alternative forum in the Netherlands for resolving this dispute. In fact, they have represented to the Court that California law will apply to this litigation. Thus, even if a Dutch court were available to adjudicate this matter, it would have to interpret California law. This fact alone militates heavily in favor of this Court's assertion of jurisdiction.

* * * *

In sum, the exercise of personal jurisdiction over MSN/Cremers is proper because (1) the Defendants purposefully availed themselves of the benefits and privileges of transacting business in California, (2) Plaintiff's alleged injury arose out of that purposeful availment, and (3) the exercise of such jurisdiction is not unreasonable. Thus, the Defendants' motion to dismiss for lack of personal jurisdiction is denied.

III. FORUM NON-CONVENIENS

A forum non-conveniens determination is committed to the sound discretion of the district court. *See Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9th Cir. 1998). In deciding whether to dismiss an action on forum non-conveniens grounds, the Court must examine (1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favors dismissal. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); *Ceramic Corp. of America v. Inka Maritime Corp.*, 1 F.3d 947, 949 (9th Cir. 1993); *Lockman Found v.*

Evangelical Alliance Mission, 930 F.2d 764, 767 (9th Cir. 1991). In this case, the Defendants have failed to carry their heavy burden of proving the existence of an adequate alternative forum. Moreover, the balance of public and private interest factors does not militate in favor of dismissal.

A. Adequate Alternative Forum

"The defendant bears the burden of proving the existence of an adequate alternative forum." *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir. 1983). The Supreme Court has held that, where the plaintiff is a United States citizen, the defendant must satisfy a heavy burden of proof because "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." *Piper Aircraft*, 454 U.S. at 256 (citation omitted).

As discussed above in connection with the Court's personal jurisdiction analysis, the Defendants have failed to establish the existence of an adequate alternative forum in Holland to adjudicate this dispute. Given the heavy deference accorded to Plaintiff's choice of California as the forum state, there is no reason to look to other jurisdictions, much less to a foreign country, in search of a more appropriate legal forum. For this reason alone, the Defendant's forum non-conveniens claim fails.

B. The Balance of Public and Private Factors

Furthermore, the balance of private and public interest factors favors Plaintiff, not the Defendants. Ordinarily, a plaintiff's choice of forum will not be disturbed unless the "private interest" and the "public interest" factors strongly favor trial in a foreign jurisdiction. *Gulf Oil*, 330 U.S. at 509.

1. ***The Private Interest Factors***

Courts consider the following private interest factors: (1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508. This Court may look to any or all of the above factors which are relevant to the case before it, giving appropriate weight to each. *See id.*

Here, Cremers argues that he would be inconvenienced by having to litigate in California since he resides in Holland. Apparently, Cremers is currently unemployed with no income other than Dutch unemployment benefits. He also claims that he rarely travels to the United States or California. As Plaintiff correctly points out, however, Cremers has secured excellent representation in the state of California despite his meager income. Moreover, it is only appropriate that Cremers be required to defend his website activities here, given that he has traveled to the United States and California on earlier occasions in order to promote his website.

Additionally, access to witnesses and evidence is not hindered by this Court's retention of the instant lawsuit. There are very few witnesses in Holland, and the witnesses in North Carolina have already been deposed. Moreover, Smith himself, who lives in Virginia, has conceded that he is subject to this Court's jurisdiction. On the other hand, as Plaintiff points out, there are many individuals in California who can testify as to the effect that the publication of Smith's story had on Plaintiff. Furthermore, the various gallery owners who, according to Plaintiff, sold her the paintings in question are

also here in California. On balance, therefore, the private interest factors do not support dismissal of Plaintiff's complaint.

2. *The Public Interest Factors*

As for the public interest factors, courts may consider the following: (1) local interest in the lawsuit; (2) the court's familiarity with governing law; (3) the burden on local courts and juries; (4) congestion in the courts; and (5) the costs of resolving a dispute unrelated to the forum. *See Piper Aircraft*, 454 U.S. at 259-61; *Gulf Oil*, 330 U.S. at 508-09. As with the private factors, the public interest factors also weigh in favor of adjudicating this action in California.

First and foremost, Cremers agrees that California law applies to this case and, in fact, invokes it in his motion to strike under California's anti-SLAPP statute. This fact, by itself, strongly favors Plaintiff's position. Moreover, the Court notes that both MSN/Cremers and Plaintiff have substantial contacts in California and a great deal of the alleged injury occurred here. In short, California has the greater interest in resolving this dispute.

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In sum, the Court concludes that it would not be unduly burdensome for the Defendants to litigate the case in California. Defendants have made no showing of an adequate alternative forum, and the various public and private interest factors counsel against the dismissal of Plaintiff's complaint. Accordingly, the Court denies MSN/Cremers' motion to dismiss on forum non-conveniens grounds.

IV. DEFENDANT'S MOTION TO STRIKE UNDER THE ANTI-SLAPP STATUTE

Ruling on a § 425.16 motion to strike a complaint requires a two-step approach. First, the trial court must determine if the defense has met its burden of showing that the plaintiff's lawsuit arises out of the defendant's constitutionally protected actions. *See Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446, 452-53 (Cal. Ct. App. 1994). If the court finds in favor of the defense on that issue, the burden then shifts to the plaintiff to establish "a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1); *Metabolife Inc v. Wornick*, 72 F. Supp. 2d 1160, 1165-66 (S.D. Cal. 1999).

The second step in this two-tiered inquiry means that a plaintiff must present evidence showing it would establish a prima facie case at trial. *See Evans v. Unkow*, 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624, 627-28 (Cal. Ct. App. 1995). Plaintiff must make this showing with admissible evidence. *See* 45 Cal. Rptr. 2d at 628-29. In other words, plaintiff must produce evidence which, if presented at trial, would withstand motions for a nonsuit or directed verdict. *See Wilcox*, 33 Cal. Rptr. 2d at 454-55. A plaintiff may not rely upon the allegations in its complaint to make the required evidentiary showing. *See Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 656, 49 Cal. Rptr. 2d 620 (Cal. Ct. App. 1996).

A. Defendants' Constitutionally Protected Actions

Under the anti-SLAPP statute, any suit which arises from a person's actions done "in furtherance of [the person's] right of petition or free speech under the United States or California Constitution in connection with a public issue shall

be subject to a special motion to strike[.]" Cal. Civ. Proc. Code § 425.16(b)(1). Four types of activities are covered by the anti-SLAPP statute. *See id.* § 425.16(e). Here, MSN/Cremers' conduct qualifies either as (i) "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," or (ii) "any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* § 425.16(e)(3) - (4). Neither party contends that the MSN site is not a "place open to the public" or a "public forum," and Plaintiff concedes that information related to stolen Nazi art touches upon public matters of national and international concern. Thus, the only remaining question is whether Plaintiff has satisfied her burden of producing sufficient evidence to establish a prima facie case of defamation.

B. Plaintiff's Probability of Success

The Defendants contend that Plaintiff has failed to establish a probability of success because (1) the Telecommunications Act of 1996 (the "Act") preempts Plaintiff's defamation action, and (2) Plaintiff's evidence does not support a prima facie case of defamation. As discussed below, Defendants' first contention is without merit, and their second one cannot be resolved without further briefing by the parties.

1. *Preemption under the Telecommunications Act*

The Telecommunications Act does not preempt Plaintiff's action because MSN/Cremers is not an internet service provider within the meaning of the Act. The Act provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information

provided by another information content provider." 47 U.S.C. § 230(c)(1). The term "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.* § 230(f)(2). The phrase "information content provider," in turn, means "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

Although several cases have held that, by virtue of the Act, internet service providers cannot be sued for defamation, none are applicable here because, unlike MSN/Cremers, the qualifying entities were true internet service providers, like America Online, that provided individuals with access to the internet. *See, e.g., Ben Ezra Weinstein v. America Online, 206 F.3d 980 (10th Cir. 2000); Zeran v. America Online*, 129 F.3d 327 (4th Cir 1997); *Lockheed Martin Corp. v. Network Solutions*, 985 F. Supp. 949 (C.D. Cal. 1997); *see also Kathleen R v. City of Livermore*, 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772, 776-77 (Cal. Ct. App. 2001) (library which connected multiple users to the internet). MSN, in contrast, is clearly not an internet service provider, as it has no capability to provide internet access. To the contrary, it is plainly an "information content provider" within the meaning of the Act. Thus, the Defendants' preemption argument is without merit.

2. *Prima Facie Defamation Case*

Under the current briefing before the Court it cannot be adequately determined whether Plaintiff has established a

prima facie case of defamation. The central issue in every defamation action is whether the plaintiff is a public or private figure because the elements a plaintiff must prove to succeed differ depending on the plaintiff's public or private status. *See Gertz v. Robert Welch Inc.*, 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967); *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). In this case, the parties disagree as to whether Plaintiff is a public or private figure and, as a result, rely on divergent legal standards in their briefs. Thus, before this Court can decide whether Plaintiff has established a prima facie case, additional briefing will be required.

To facilitate that briefing, the Court makes the following legal conclusions. *See Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 965 P.2d 696, 701 (Cal. 1998) (whether defamation plaintiff is public or private figure is question of law for trial court to decide). First, contrary to the Defendants' claims, Plaintiff is not a public figure. Individuals may be either a public figure for general or for limited purposes. *See* 965 P.2d at 702. A person may be a public figure for all purposes and in all contexts where he has achieved "pervasive fame or notoriety." *Gertz*, 418 U.S. at 351. Plaintiff has not attained such pervasive fame or notoriety and, thus, is not an all-purpose public figure.

Nor is Plaintiff a public figure for limited purposes. A person becomes a limited-purpose public figure when he voluntarily injects himself into a public controversy. *See Khawar*, 965 P.2d at 702 (observing that for a private person to be considered a public figure he must have purposefully injected himself into a public controversy, thereby inviting criticism, or have acquired substantial media access in relation

to the controversy at issue). To determine whether a person's conduct rises to "voluntary injection," the Court looks to "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 351-52.

In this case, Plaintiff has not voluntarily injected herself into the controversy that gave rise to the defamation. She had no contacts with Cremers prior to learning of Smith's e-mail. She did not seek media attention regarding her ancestry or the issue of stolen Nazi art. In fact, as alleged in her complaint, Plaintiff was the one unwillingly drawn into the controversy when she was accused of possessing stolen Nazi art in an internet museum security newsletter. She then engaged in the controversy only to clear her name and, notably, refused Cremers' invitations to join in a dialogue on the MSN website regarding the controversy. Thus, Plaintiff is not a public figure for purposes of her defamation action.

Although Plaintiff is a private figure, that fact does not end the analysis. Contrary to what Plaintiff claims, she is not strictly a private figure who need only establish negligence on the Defendants' part - and nothing more - in order to prevail. Plaintiff is a private figure, but the alleged defamation concerned a matter of public concern - a fact that Plaintiff readily concedes. 'As the Supreme Court has held, a private person bringing a defamation suit regarding a matter of public concern must demonstrate falsity, at least when the defendant is a member of the media. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986).

Though some decisions after Hepps have attempted to confine its holding to media defendants, neither the Ninth Circuit nor the California Supreme Court have so held. In

fact, California's intermediate appellate courts have concluded that a private plaintiff must prove falsity with respect to even non-media defendants when the suit involves a matter of public concern. *See Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 78 Cal. Rptr. 2d 627, 633 (Cal. Ct. App. 1998); *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 54 Cal. Rptr. 2d 781, 785-87 (Cal. Ct. App. 1996). This conclusion is in accord with other jurisdictions. *See, e.g., In re IBP Confidential Bus. Documents Litigation*, 797 F.2d 632, 642 (8th Cir. 1986). Thus, for present purposes, the Court need not reach the issue of whether Cremers is a media defendant because it finds no controlling precedent restricting Hepps to media defendants only. Accordingly, Plaintiff must prove falsity as a part of her defamation case.

In view of the conclusions made above, both parties are hereby ordered to brief the following issue: whether Plaintiff, as a private figure whose suit involves a matter of public concern, has established a prima face case of defamation for purposes of Cal. Civ. Proc. Code § 425.16. The briefs may not exceed eight (8) pages, and the parties MUST specifically reference their supporting evidence by page and line number. Plaintiff's brief is to be submitted by June 19, 2001; Defendants' opposition by June 29, 2001; and Plaintiff's reply by July 6, 2001. After such briefing has been completed, the Court will rule on the Defendant's motion to strike Plaintiff's complaint pursuant to the anti-SLAPP statute.

V. CONCLUSION

For all the foregoing reasons, the Defendants' motion to dismiss Plaintiff's complaint for lack of personal jurisdiction and on grounds of forum non-conveniens is hereby DENIED. The Defendants' motion to strike Plaintiff's complaint under § 425.16 of the California Code of Civil Procedure will be

decided after additional briefing has been completed by both parties pursuant to the Court's instructions above.

IT IS SO ORDERED.

DATED: 6/5/2001

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE